LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 26 1963
JOHN F. DAVIS, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. **871**

PROGRESS DEVELOPMENT CORPORATION, *Petitioner*,

v.

DEERFIELD PARK DISTRICT, *Respondent*.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

JOSEPH L. RAUH, JR.,
EUGENE GRESSMAN,
JOHN SILARD,
*1625 K Street, N. W.,*
*Washington 6, D. C.*

JOHN W. HUNT,
RICHARD G. KAHN,
HOWARD HOOSIN,
JOHN P. MORRIS,
*135 South LaSalle Street,*
*Chicago 3, Illinois*
*Attorneys for Petitioner.*

## INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Constitutional and Statutory Provisions Involved | 2 |
| Statement | 2 |
| What Happened in Deerfield Up to November 11, 1959 | 3 |
| What Happened in Deerfield After November 11, 1959 | 7 |
| Reason for Granting the Writ | 15 |
| The Supreme Court of Illinois Has Decided A Federal Question of National Significance in a Way Not in Accord With Applicable Decisions of This Court | 15 |
| The Issue Raised by This Case is One of National Significance | 15 |
| The Holding of the Supreme Court of Illinois That Need and Suitability for Parks Validates a Taking of Land Irrespective of Racial Considerations is in Direct Conflict With the Decisions of This Court | 17 |
| The Undisputed Record Herein Demonstrates an Overwhelming Case of Constitutional Infringement | 22 |
| Conclusion | 26 |
| Appendix A | 28 |
| Appendix B | 37 |
| Appendix C | 41 |

## Table of Cases


| | Page |
|---|---|
| *Barrows* v. *Jackson*, 346 U.S. 249 | 15 |
| *Bates* v. *Little Rock*, 361 U.S. 516 | 19, 20 |
| *Bolling* v. *Sharpe*, 347 U.S. 497 | 26 |
| *Buchanan* v. *Warley*, 245 U.S. 60 | 15 |
| *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 | 21, 24, 25 |
| *City of Creve Coeur* v. *Weinstein*, 329 S.W. 2d 399 (Mo.) | 16 |
| *Cooper* v. *Aaron*, 358 U.S. 1 | 20 |
| *Eubanks* v. *Louisiana*, 356 U.S. 584 | 24 |
| *Gomillion* v. *Lightfoot*, 364 U.S. 339 | 20, 21 |
| *Griffin* v. *Illinois*, 351 U.S. 12 | 26 |
| *Guinn* v. *United States*, 238 U.S. 347 | 20 |
| *Hernandez* v. *Texas*, 347 U.S. 475 | 24 |
| *Korematsu* v. *United States*, 323 U.S. 214 | 20 |
| *McFarland* v. *American Sugar Refining Co.*, 241 U.S. 79 | 19 |
| *NAACP* v. *Alabama*, 357 U.S. 449 | 20 |
| *NAACP* v. *Button*, 371 U.S. 415 | 19, 20 |
| *Norris* v. *Alabama*, 294 U.S. 587 | 24 |
| *Pennsylvania* v. *Board of Trusts*, 353 U.S. 230 | 20, 25 |
| *Progress Development Corp.* v. *Mitchell*, 182 F. Supp. 681 (N.D. Ill. E.D.), rev'd 286 F.2d 222 | 6 |
| *Reece v. Georgia*, 350 U.S. 85 | 24 |
| *Shelley* v. *Kraemer*, 334 U.S. 1 | 15, 20, 25 |
| *Snowden* v. *Hughes*, 321 U.S. 1 | 18 |
| *Steele* v. *Louisville & Nashville RR Co.*, 323 U.S. 192 | 21 |
| *Terry* v. *Adams*, 345 U.S. 461 | 20, 25 |
| *United States* v. *McElveen*, 180 F. Supp. 10; aff'd 362 U.S. 58 | 25 |

## Table of Cases


Page

*Western Springs Park District* v. *Falls*, No. 52 C 14741 (June 9, 1953) ..... 16

*Wiley* v. *Richland Water District*, Civil No. 60-207 (D.C. Ore., 1960) 5 Race Rel. L. Rep. 788..... 16


## Miscellaneous


Abrams, *Forbidden Neighbors*, 210 (1955) ..... 15

Executive Material: Executive Order No. 11063, November 20, 1962, 27 Fed. Reg. 11527 ..... 16

Federal Statutes: 28 U.S.C. 1257(3) ..... 2

Grier, *Discrimination in Housing*, 19 (1960) ..... 15

Opinions of the Supreme Court of Illinois:

22 Ill. 2d 132, 174 N.E. 2d 850 ..... 1

26 Ill. 2d 296, 186 N.E. 2d 360 ..... 2

Rosen, Harry and David, *But Not Next Door* (1962) 14

United States Commission on Civil Rights Report No. 4, *Housing* (1961) .....14, 15

Weisbord, *Homes Without Hate*, The Progressive, January, 1961 ..... 14

# In the
# Supreme Court of the United States

OCTOBER TERM, 1962

---

No.

---

PROGRESS DEVELOPMENT CORPORATION, *Petitioner,*

v.

DEERFIELD PARK DISTRICT, *Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

---

*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioner, Progress Development Corporation, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois in this case.

## OPINIONS BELOW

The first opinion of the Supreme Court of Illinois, reported at 22 Ill. 2d 132, 174 N.E. 2d 850, is printed as Appendix A, pp. 28 to 36, *infra*. The opinion of the Circuit Court of Lake County, Illinois, on remand, is not reported,

but is printed in the record at pages 246-282. The second opinion of the Supreme Court of Illinois, review of which is here sought, is reported at 26 Ill. 2d 296, 186 N.E. 2d 360 and is printed as Appendix B, pp. 37 to 40, *infra*. The judgment of the Supreme Court of Illinois is printed as Appendix C, pp. 41 to 42, *infra*.

## JURISDICTION

The judgment of the Supreme Court of Illinois was entered on November 30, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), petitioner having asserted below and urging here denial of rights secured by the Fourteenth Amendment to the Constitution.

## QUESTIONS PRESENTED

(1) Was the Supreme Court of Illinois correct in holding that a showing of racial application of the eminent domain law is foreclosed whenever property being condemned is needed and suitable for parks?

(2) Is equal protection denied by a public condemnation achieved through the joint participation of public authorities and private citizens to maintain the all-white character of the community?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides in part as follows: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Eminent Domain Act of Illinois is found in Chapter 47 of the Illinois Revised Statutes.

## STATEMENT

The Village of Deerfield is an all-white suburban municipality about twenty miles northwest of Chicago, with a

12,000 population (R. 10, 67, 149, 151-52, 165). Petitioner, Progress, came to Deerfield in early 1959, bought two separate sites for residential development and commenced construction with the full approval of the Village authorities (R. 68-69, 125-27).

On November 11, 1959, Deerfield first learned that Progress intended to sell homes to Negroes as well as whites (R. 84-85, 158, 200, 201, 254). Within hours construction was stopped by Village order (R. 129-130). Village protest meetings inflamed the community (R. 131-33, 139, 141-45, 158, 160-61, 166-69, 177, 183, 188-89, 194-95, 200, 208, 255-57). A racist citizens' group was formed to block the integrated housing plans (R. 256). On December 5 and 6, a Village-wide poll was taken on housing integration—eight to one against Progress (R. 142, 257-58).

On the following day, to satisfy the community demand that Progress be stopped, the Park Board took formal action to condemn both of Progress' residential developments (R. 258). A bond issue referendum for this purpose was passed December 21 (R. 247). On December 24, 1959 the Park Board filed petitions for condemnation (R. 1).

Over petitioner's constitutional objections (R. 4, 18, 31, 37), the Supreme Court of Illinois has upheld the condemnation solely on the ground that Deerfield needed parks and Progress' two sites were suitable for parks. The Court foreclosed any and all consideration of petitioner's evidence that the condemnation was occasioned by, was built upon, resulted in, and was achieved through, racial discrimination. We set forth below the undisputed sequence of events evidencing that discrimination.

## What Happened in Deerfield Up To November 11, 1959

Petitioner is an Illinois corporation following a policy of building homes available for purchase by Negroes as well as whites. Max Weinrib, an officer of Progress, was

employed to acquire sites for residential development and to construct and sell homes thereon (R. 124). In his quest for sites, Weinrib went to Deerfield in February 1959 and noted large "For Sale" signs on a 15-acre tract called Floral Park and a 7-acre tract called Pear Tree, both unimproved pieces of real estate and separated by intervening properties (R. 68-69, 125-126). Weinrib promptly entered into negotiations for their purchase and bought the tracts on behalf of Progress (R. 125-126).

Weinrib secured a firm of engineers to prepare a subdivision plat of the Floral Park property, providing for 39 homesites. In order to secure the necessary Village approvals for the plat, Weinrib attended several meetings of the Board of Trustees and of the Deerfield Planning Commission (R. 126). The plat was approved by the Village Board of Trustees on July 8, 1959 (R. 69, 126) and a similar plat for 12 homesites at Pear Tree was approved by the Board of Trustees in August, 1959 (R. 69, 126).

Because Floral Park and Pear Tree are situated within School District No. 110, Weinrib also attended meetings of the School Board in connection with these plats (R. 127). At a meeting in April, 1959, Weinrib outlined Progress' proposed housing development at Floral Park, which is located across the street from the Wilmot School (R. 128). He described the number and kinds of houses to be built and a discussion ensued as to the estimated number of children who might attend school from these homes (R. 128). It was further reported at this meeting that Progress had agreed to contribute $350 to the School District for every home built in Floral Park, with the exception of two model homes. This contribution, made by agreement with the School District, was a condition to the approval of the plat by the Board of Trustees (R. 127). And on August 11, 1959, the School Board was informed that Progress planned to construct twelve houses on the Pear Tree property and that Progress would contribute to the

School District the sum of $350 for each of those homes (R. 80).

Thus, the approval of Progress' plans was discussed at all of these Village Board, Planning Commission and School Board meetings and no objections thereto were offered by anyone; nor did anyone state that either or both of these properties or any parts thereof would be used or needed for park purposes in the future (R. 127, 202). And while the Village Board, the Planning Commission and the School Board were all giving their affirmative blessing to Progress' plans, the Park Board disavowed any interest in these sites. As late as August, 1959, when the Park Board ran an unsuccessful referendum for a swimming pool and related park sites, it chose other sites to meet the park needs of the community.[1]

---

[1] Like any other community, Deerfield has an admitted general need for more park land (R. 113), and this need was a subject of Park Board consideration. But during the year 1959, while the Park Board met many times prior to the November 11 integration news, there is no reference in any of the official minutes of the Board to either the Floral Park or Pear Tree properties (R. 72). Although the Park Board received a written report on May 19, 1959 from its planning consultant on the subject of possible swimming pool sites (R. 117), none of the three possible sites mentioned were either Floral Park or Pear Tree or close to either of them (R. 91-95). Roy Layman, the consultant who prepared this swimming pool report, testified that he had made an oral recommendation in May, 1959, for the acquisition of petitioner's sites, but Park Board members admitted that they had not considered them "for purchase" (R. 184-185, 192, 197). That neither site was being considered for purchase is confirmed by the fact that, when the Park Board ran a referendum for a swimming pool and other park sites in August, 1959, *none* of the money sought was to be used to acquire either Floral Park or Pear Tree, nor was any provision made in the referendum for the acquisition of either site (R. 81). In August 1959, and from then on till November 11, 1959, the Park Board showed no interest whatsoever in Floral Park or Pear Tree. Mr. Mitchell, President of the Park Board, was fully aware of the construction at Floral Park (R. 166) and he and the other Park Board members evidenced no interest in petitioner's sites for potential parks.

Following community approval of the Floral Park subdivision plat in July, Progress began construction work on the property. Water and sewer improvements were undertaken late in August and thereafter Progress was "in continuous process of construction" (R. 128). Building permits were obtained, following several changes and corrections in the plans at the behest of the building commissioner, who told Weinrib that, "if every builder would undertake to act in the same manner, they would have very few headaches when it came to construction in the village" (R. 128). On the basis of the permits issued in late September, construction was started on two model homes. Foundations were dug, footings were installed, and carpentry work was begun (R. 128-129). By November 11, 1959, the two homes were approximately in the stage of being "carpentry-roughed"—i.e., the roof was on, the partitions were going in, and the plumbing work had started (R. 129).

Such was the state of affairs in Deerfield generally and at Floral Park and Pear Tree in particular on the eve of November 11, 1959—a quiet, normal community in which a substantial residential project was under active construction with full community approval. The night of November 10 was like any other night in Deerfield—School Board No. 110 was meeting to discuss such things as handball facilities at the junior high school (R. 82). Then suddenly, on November 11, life in Deerfield took a dramatic and fearsome change. "The whole community was thrown into an uproar after November 11, 1959 when it became known to the officials and citizens of Deerfield that some of the houses that [Progress] proposed to build would be sold to Negroes and other non-Caucasians."[2]

---

[2] *Progress Development Corp.* v. *Mitchell*, 182 F. Supp. 681, 705 (N.D. Ill. E.D.), rev'd 286 F.2d 222. This was the civil rights suit commenced by Progress against Deerfield authorities and certain private citizens. Trial has been postponed indefinitely pending resolution of the entire matter in the state proceedings of which review is here sought.

## What Happened in Deerfield After November 11, 1959

On November 11, 1959, Deerfield first learned that Progress intended to sell some of its homes in Floral Park and Pear Tree to Negroes (R. 84-85, 158, 200, 201, 254). On the night of November 11 two Deerfield residents appeared at a meeting of the Village Board of Trustees and informed Joseph Koss, President of the Board of Trustees, "that Negroes might move into the proposed Floral Park and Pear Tree Subdivisions" (R. 158). Koss repeated the rumor to the other Board members immediately following the regular meeting that night (R. 158).

The Village Board of Trustees went into instant action. As Kross himself testified, "I believe Mr. Bowen, the village engineer in charge of building inspection, was absent from the meeting, and we decided Thomas Matthews, the village attorney, should talk to him rather than us" (R. 158). Matthews did his work effectively, for, when Weinrib arrived at Floral Park on November 13, he found that Village engineer Bowen had been there ahead of him and had stopped all construction (R. 129).[3]

Four days later, at a Park Board meeting on November 17, there was manifested a suddenly revived citizens' inter-

---

[3] Weinrib arrived at the Floral Park job site about noon on November 13th and found the workers preparing to leave. The carpenters advised him that Building Commissioner Bowen and an inspector had stopped the job and refused to permit any further work to proceed (R. 129). On inquiry to the building commissioner as to the reason for the stoppage, Weinrib was advised that two carpentry violations as to one house and the absence of "stamped" plans at the site of the second house had led to the stop order (R. 130). The plans as to the second house were also declared to be no longer acceptable without corrections (R. 130). A second stop order was issued on December 19, purportedly based on the absence of a spot survey of the two houses (a requirement not previously imposed) (R. 130). And a third stop order was issued on December 21, 1959, purportedly based on improper location of the front eaves of the two houses, although these eaves were exactly as shown on the original plans approved by the Building Commissioner (R. 130-131).

est in parks for Deerfield.[4] Among the citizens who addressed the Board on the need for parks was Joseph Powell, head of a local group known as the Deerfield Citizens Committee. Powell stated "there was a need for parks in Deerfield, the population growth of Deerfield was continuing, and there was a need for more parks" (R. 194-95). Powell told the Board that his Committee had started to prepare a report on the acquisition of parks in the spring of 1959 and, if the Board wished, the Committee "would be glad to complete that report" (R. 149). Dudley Dewey, who had been on the Park Board for 4½ years, testified he had never seen Mr. Powell prior to this November 17 meeting (R. 188-189). Nevertheless, the Park Board adjourned until December 7 to await the proferred citizens' report (R. 195, 255).

The next night, November 18, the Village Board of Trustees met in the Village Hall with a large crowd present (R. 144). The Village Manager read an official statement from the Village Board of Trustees stating "that the people of the community are gravely concerned" over the Progress development "on a so-called integrated basis." "The people are demanding," said the statement, "that action be taken to maintain their property values and the social fabric of the Village" (R. 200). In addition, "there was a lot of conversation by others about the proposed subdivisions" (R. 144). After the formal meeting adjourned, the crowd remained and a public discussion took place concerning the Progress project (R. 255). An unidentified woman stated that a petition would be circulated "to stop the Progress subdivision from becoming a reality" (R. 144).

Another meeting of the Village Trustees took place on November 23 in the Village Hall before an overflow crowd, with police stationed in the corridors and reporters and

[4] As noted above, see p. 5, *supra*, only three months earlier a park referendum had been turned down by the community (R. 81).

TV cameramen present (R. 131, 145, 160-161, 166-168, 255). Among those attending the meeting was one Harold Lewis, who had indicated his intent to organize a group "to assist the Village Board to prevent the integrated subdivision" (R. 167). The entire meeting was devoted to Progress' plans for racially integrated housing in Deerfield (R. 132). Joseph Koss, the Village Board President, chaired the meeting (R. 132).

During a temporary adjournment of this meeting, while the Board members held a private caucus, Harold Lewis spoke to the assembled public. He "stated that the procedures and acts of Progress Development Corporation were un-American; that a way could be found to prevent this development from proceeding, and that if the people kept their heads a way could be found to do this" (R. 133; and see R. 145, 167, 255-256). He also spoke of Progress "being a Communist scheme or some type of totalitarian scheme, a group who tried to sneak into Deerfield and cram this idea of integration down the people's throats" (R. 167). An announcement was made that petitions protesting Progress' plans were being circulated (R. 168).

After the meeting adjourned, about 500 people went across the street to the American Legion Hall for another meeting (R. 135, 168, 256). Carl Bagge stated that he and other attorneys had joined Lewis "to assist the board in doing something about the integrated subdivision"; he said that he was sorry that the last bond-issue referendum had been defeated, but he felt that "opinion in Deerfield had changed and it might be possible now to get the referendum passed; that he was aware that they were trying to avoid their social responsibility, that a terrific price had to be paid when people avoided their social responsibility, that he was willing to pay his price and he thought the audience was" (R. 168). A five-minute standing ovation greeted Bagge's speech (R. 168).

Thus was first brought to public view the community's plan for solving the twelve-day old racial integration issue by condemning the Progress properties and obtaining the necessary public support for the bond issue. The first step, taken that very night, was the formation of the openly racist North Shore Residents Association to combat Progress' plans (R. 256).

Another crowded public meeting was held the next night, November 24, at the Deerfield Grammar School. Mr. Koss, the Village Board President, again presided. He said the Village Board of Trustees "had straightened things out," and that "they would withhold what they had decided until some time later" (R. 169). As a member of the North Shore Residents Association later admitted to a reporter, "it had been pretty generally decided with the Village Board that since the Village Board had already approved the subdivision, and there seemed to be no flaw in their approval, there wasn't much they could do so the issue would be turned over to the Park Board to do something about it" (R. 170).

A few days later a number of members of the North Shore Residents Association met at the home of John Jursich (R. 141). At this meeting plans were made for raising funds and placing newspaper advertisements. Such an advertisement appeared in the Deerfield Review on December 3, 1959 (R. 202-209). This ad referred to the Floral Park Subdivision as "a racially integrated housing project" (R. 202) that was "detrimental to the Village of Deerfield and its residents" (R. 203). The advertisement further stated that the Association's Legal Committee had conducted "an extensive study of law on the matter and effective plans have been devised" (R. 206). It concluded with this statement: "The vast majority of the people of Deerfield are certain that they are morally right in resisting this thing. And they are convinced a small group of

outside developers, no matter how lofty their claimed objectives, cannot master legal technicalities to compel 16,000 Deerfield residents to submit to their dictates" (R. 209).

A second meeting took place in the Jursich home on December 3, 1959, attended by James Mitchell, the President of the Park Board, by Harold Lewis, the chairman of the North Shore Residents Association, and several other members of the Association (R. 139, 141, 257). Lewis testified that there was discussion about possible action by the Park Board and the possibility of a bond-issue referendum (R. 141-142). Mr. Robert Mullen, a member of the Residents Association present at Jursich's, testified (R. 139): "There was much concern that condemnation acquire park sites."

On December 5 and 6, the North Shore Residents Association conducted a poll of Deerfield residents to see how many favored or opposed an integrated housing development at Floral Park (R. 142, 257-258). During the taking of the poll, members of the Association were heard to describe the Floral Park plans as a "Communist scheme" (R. 171). The result of the poll was eight to one against Progress—3500 opposed, 400 in favor, and some 50 without opinion (R. 258).

On December 6, following the poll, Park Board Members James Mitchell and Edward Walchli met at Joseph Powell's home to receive the latter's report from the Deerfield Citizens Committee regarding over-all park plans (R. 183). On December 7 the Park Board had a "rather short meeting" (R. 191); it took formal action to condemn Floral Park and Pear Tree and authorized offers of purchase to Progress (R. 258). The formal resolutions and minutes documenting this action had been prepared prior to the meeting (R. 163-164). The meeting was succinctly described by Board member Dewey: "We read the report of the Citizens Committee. Mr. Mitchell presented it and

then we voted on the referendum . . ." (R. 191).[5] The bond-issue referendum was scheduled for December 21 (R. 88). Park Board President Mitchell testified that his "personal feeling was that there were apparently a number of people that wanted to work to sell a bond issue, and it would be perhaps the ideal time to run a referendum" (R. 157).[6]

The Park Board meeting was only the first of three attended by Mr. Mitchell on the evening of December 7. He rushed from the Park Board to a meeting of School Board No. 109 (R. 164, 185). There Mitchell asked the School Board if it would be willing to "accept" money from the Park Board in obtaining sites that the School Board desired (R. 185-186). Mitchell remembered sitting down next to a Mrs. Lourie at the School Board meeting and her

---

[5] As Mitchell himself later conceded, "there was nothing contained in that report of the citizens committee which gave us information which we didn't know on November 17, 1959" (R. 157). An additional and obviously more significant reason for continuing the November 17 meeting of the Park Board to December 7 was given by its Secretary. When a reporter asked the Secretary of the Park Board as to the reasons for adjourning the November 17 meeting to December 7, the Secretary stated "that they had adjourned from November 17 to a later date in order to get a reply back on this balloting that had been done by the North Shore Residents Association" (R. 171). When asked if the date had been definitely set for December 7, the Secretary replied, "yes, it had but they had an understanding that if the answers were not back on the balloting they would meet and adjourn until they did have the answers back on the balloting" (R. 171-172).

[6] In contrast to Mitchell's suggestion that Christmas was "the ideal time to run a referendum" for a swimming pool on the North Shore of Lake Michigan, in his earlier testimony concerning the August referendum that "we figured that the month of August would be a good time to sell it, including a municipal swimming pool, because of the heat" (R. 154). Significantly, too, Mitchell conceded they had "never before held a bond issue just before Christmas" and that he had "never heard of any public body doing so just prior to Christmas . . ." (R. 163).

saying, "Oh, come on, Jim, you know the reason you want this bond issue passed is because of this integration situation, isn't it, Jim" (R. 164). Mitchell does not "remember replying" (R. 164).

Following this second meeting, Park Board Members Mitchell and Walchli met again with Harold Lewis and other members of the Residents Association at the Jursich home. The Park Board's offers of purchase were there turned over to certain members of the Residents Association to deliver to Progress (R. 137, 162, 258).

With the scheduling of the referendum for December 21, the Residents Association swung into high gear. At a public meeting on December 15, Chairman Harold Lewis admitted that "it really was the color of the Negroes which was one of the basic issues" disturbing the Park Board and the Residents Association (R. 172). And on December 16, 1959, Lewis, again acting in his role as Chairman of the Residents Association, addressed a letter to the Association of Citizens Councils at Greenwood, Mississippi, expressing appreciation for the material sent to him concerning "the problem of integration" (R. 210-211). The letter further stated that the citizens of Deerfield have "thus far remained united and determined to resist at any cost." Support from the White Citizens Councils was solicited in Deerfield's fight against the "conspiracy to deceive its government and residents." About the same time that Lewis was pleading with the White Citizens Councils for help, he prepared, printed and distributed throughout Deerfield (R. 143) a leaflet entitled "The Massive Wallop!" Decrying "Communist and extreme left-wing elements" in "all phases of our daily life," the Massive Wallop attacked the Chief Justice and the school desegregation decision as a "threat to representative government" and "judicial

usurpation of legislative power," and on this basis urged defeat of integration in Deerfield (R. 215-219).

The result of the December 21 referendum was a foregone conclusion. The voters approved the bond issue by a two-to-one margin (R. 247). All the principals in the cast listened to the election results that night at Park Board Chairman Mitchell's house—Powell was there and so were Lewis and the others (R. 191). They could indeed be gratified by their work—no Negroes were coming to Deerfield.

Three days later, December 24, the Park District commenced this condemnation proceeding in the Illinois state courts. More than three years later, after two appeals to the highest court of the State, petitioner is still awaiting judicial consideration of the constitutionally relevant facts just recited. For the Supreme Court of Illinois has twice ruled that, if the condemned properties are needed and suitable for parks, constitutional inquiry into the discriminatory application of the eminent domain law is wholly foreclosed. What the Supreme Court of Illinois has overlooked is the fact that need and suitability for parks is the *beginning* not the end of the matter under the Fourteenth Amendment; its ruling presents profound and significant constitutional issues for this Court's review.[7]

---

[7] The instant case has been the subject of a perceptive book, Harry and David Rosen, *But Not Next Door* (1962), and has been summarized in the 1961 United States Commission on Civil Rights Report No. 4, *Housing*, pp. 132-134. See also Weisbord, *Homes Without Hate*, The Progressive, January 1961, pp. 28-32. Note might be taken, too, of the statement of Mrs. Franklin D. Roosevelt after she had sought to mediate the Deerfield controversy: "The issues in Deerfield have to be faced across the land. Deerfield is the Little Rock of housing." See *New York Times*, Dec. 1, 1962.

## REASON FOR GRANTING THE WRIT

## THE SUPREME COURT OF ILLINOIS HAS DECIDED A FEDERAL QUESTION OF NATIONAL SIGNIFICANCE IN A WAY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT

### The Issue Raised by This Case is One of National Significance

As efforts have been made to provide equal opportunity in housing, local governments have devised a variety of schemes under color of law to close the door. While racial zoning laws have been outlawed (*Buchanan* v. *Warley*, 245 U.S. 60) and restrictive covenants held unenforceable (*Shelley* v. *Kraemer*, 334 U.S. 1, *Barrows* v. *Jackson*, 346 U.S. 249), local authorities have frequently devised methods "more subtle, motives less discernible, and exclusions more effective."[8] "Local government agencies have played an important part in excluding minorities from many areas, particularly in the suburbs. Zoning powers, building codes, control over sewers and other utilities, and other governmental prerogatives have been used."[9] Areas designed for integrated or minority group housing have been subjected to sudden zoning reclassifications, increased tax assessments, master planning changes, larger lot size requirements, increased curb and sidewalk requirements, delays in subdivision approvals, refusals and delays in road or sewer extensions, and dilatory and harassing building inspection actions.[10] Nor are these "more subtle" methods limited to any particular region of the country—the issue raised by

---

[8] Abrams, *Forbidden Neighbors*, 210 (1955).

[9] Grier, *Discrimination in Housing*, 19 (1960).

[10] Cf. 1961 United States Commission on Civil Rights Report No. 4, *Housing*, 132-138.

this case is national in scope, affecting the North equally with the South.

One of the most effective anti-integration devices has been the use of the eminent domain power—the power utilized in the present case—for driving out and preventing the development of integrated housing.[11] The "public" purposes for which such developments can be condemned are infinite—parks, swimming pools, schools, roads, airports, libraries, public buildings, air raid shelters, and the like. In an area where a host of governmental powers are available to frustrate integrated housing, courts must be vigilant against discriminatory governmental action with such far-reaching effects.

Indeed, judicial tolerance of discrimination in housing would be in sharp contrast to the recent action of the Federal Government setting a national policy against discrimination in housing. Executive Order No. 11063, November 20, 1962, 27 Fed. Reg. 11527. The decision below encourages the very discrimination the Executive branch of the Government has now interdicted. It will avail little for the President to order that all federally-assisted housing be on a non-discriminatory basis if suburban all-white communities can bar open-occupancy builders through the devices mentioned above. Our avowed national policy of

---

[11] See, e.g., *Wiley* v. *Richland Water District*, Civil No. 60-207 (D. C. Ore., 1960), 5 *Race Rel. L. Rep.* 788, where a water district sought to utilize the power of eminent domain to prevent the building of a residence for Negroes. See also *Western Springs Park District* v. *Falls*, No. 52 C 14741 (June 9, 1953), a decision by the Circuit Court of Cook County, Illinois; there the court found that an otherwise lawful condemnation for park purposes of a lot purchased by a Negro couple, was the result of the park district's purpose to keep the couple out of an all-white community. Such action was found to be an abuse of the condemnation power. See also *City of Creve Coeur* v. *Weinstein*, 329 S.W. 2d 399 (Mo.). There a Negro couple unsuccessfully sought to resist a municipal condemnation suit to turn the house they were building into a playground and park.

fair housing practices depends for its success on judicial nullification of eminent domain abuses and other state and local devices which will otherwise be available against the non-discriminatory builders the Executive Order seeks to encourage.

Thus, the validation by the Supreme Court of Illinois of a racially-tainted condemnation presents a nationally significant question all apart from the constitutional principle upon which it validated the tainted condemnation. But review has been rendered doubly necessary by the fact that, in validating Deerfield's racial abuse of eminent domain, the Supreme Court of Illinois applied a standard which opens the gates wide to the easiest kind of evasion of constitutional obligations under the Fourteenth Amendment. By ruling that community need for parks and the suitability of the land taken for that purpose forecloses all further constitutional scrutiny, the Court has given the go ahead signal to local authorities of all varieties to find devices for circumventing the Fourteenth Amendment. The standard adopted by the court below, to which we now turn, sweeps aside this Court's significant authorities requiring judicial scrutiny sufficiently discerning to preclude all forms of state support for racial discrimination.

### The Holding of the Supreme Court of Illinois That Need and Suitability for Parks Validates a Taking of Land Irrespective of Racial Considerations is in Direct Conflict With the Decisions of This Court

The opinions of the court below are clear. On the first appeal, from the order of the Circuit Court of Lake County summarily condemning the property (R. 57-62), the Supreme Court of Illinois decided that a hearing was necessary before the Circuit Court solely to determine what it described as "the material questions of fact," namely, "whether or not Deerfield needed park sites; whether or not Progress's property is suitable for park sites; and whether

or not these sites will be devoted to public use" (p. 34, *infra*). The Court went on to say that, "if parks are needed in Deerfield, and if the land so selected for them is appropriate for that purpose, the power of eminent domain cannot be made to depend upon the peculiar social, racial, religious, or political predilections of either the condemning authority or the affected property owner" (p. 35, *infra*). The Court therefore remanded the case "for the sole purpose of permitting Progress a full hearing on the question of whether this taking is necessary and for a public purpose" (R. 64).

On the second appeal, this time after need and suitability for parks was demonstrated and in fact conceded, the Supreme Court of Illinois repeated its ruling that this was all there was to the case. It closed its eyes to the admitted facts recited above, saying, "The evidence clearly shows parks are needed in Deerfield and that the land condemned is appropriate for that purpose. Progress has had a full hearing and opportunity to refute this proof and did not. The decision of the trial judge was correct" (p. 40, *infra*).

This holding that need and suitability is the end of the search misconceives the nature and the thrust of the Equal Protection Clause of the Fourteenth Amendment. Evidence as to the need for parks and appropriateness of the condemned land for park purposes relates only to the legality or illegality of the action from the standpoint of Illinois eminent domain law. But the Equal Protection Clause is not concerned with such matters. The legality or illegality of official action in light of state law "can neither add to nor subtract from its constitutional validity", since a "mere violation of a state statute does not infringe the federal Constitution." *Snowden* v. *Hughes*, 321 U.S. 1, 11. What *is* the concern of the Equal Protection Clause is a knowingly unequal application of state law, discriminating against those who are entitled to be treated equally.

With the foregoing area of proof in mind, judicial in-

quiry must be concerned with the possibility of a knowingly unequal discrimination in the terms or application of state law. And if it be clear that the exercise of such a fundamental power as condemnation comes within the four corners of the eminent domain statute, that consideration but opens the constitutional inquiry. *Need and suitability are the beginning not the end of the matter under the Fourteenth Amendment.* For it has long been obvious that a seemingly proper exercise of such power—proper, that is, in terms of the relevant state statute—may entail forbidden encroachment upon individual freedom guaranteed by the Fourteenth Amendment. See *Bates* v. *Little Rock*, 361 U.S. 516, 524-525. "For a State may not, under the guise of prohibiting professional misconduct [or of eminent domain], ignore constitutional rights." *NAACP* v. *Button*, 371 U.S. 415, 439.

Simply put, the decision of the Court below cannot stand because need for parks and ultimate use as parks can be present in the face of obvious violations of the Equal Protection Clause. Suppose, for example, Progress had purchased 20 properties scattered all over Deerfield for integrated housing and the Park Board had condemned all 20, leaving the intermediate properties wholly untouched. Assuming there were a general need for park land and these sites would be utilized as parks, no one could rationally contend that a court would be foreclosed from inquiry into an apparent knowing discrimination. Surrounding circumstances may demonstrate, as they so obviously do here, that one or two governmental takings are as racially tainted as 20. cf. *McFarland* v. *American Sugar Refining Co.*, 241 U.S. 79, 86-87.

Indeed, the decision below does not even leave room for judicial discernment of an Equal Protection violation in circumstances where Park Board authorities overtly concede that they are racially motivated in exercising the condemnation power. Suppose, for example, that Park

Board members had explicitly stated that Floral Park and Pear Tree, although needed and suitable for parks, were not nearly the best places in town for parks, and were chosen because this would keep Negroes out of Deerfield. Under the holding of the Supreme Court of Illinois, even this admitted and patently illegal discrimination would be immune from scrutiny.

The unduly restrictive standard of Fourteenth Amendment inquiry employed by the Supreme Court of Illinois in this case disregards the profound constitutional strictures of this Court. In cases involving racial discrimination, this Court has steadfastly and continuously required judicial inquiry sufficiently broad and sensitive in its scope to reach discrimination however it may be effectuated. Such cases have been subjected by this Court to "the most rigid scrutiny" (*Korematsu* v. *United States*, 323 U.S. 214, 216) so as to discern both ingenuous and ingenious forms of discrimination (see *Guinn* v. *United States*, 238 U.S. 347, 364; *Cooper* v. *Aaron*, 358 U.S. 1, 17; *Gomillion* v. *Lightfoot*, 364 U.S. 339).

Moreover, the standard applied by the Supreme Court of Illinois is not merely inadequate to discern discriminatory purposes. It also bypasses significant rulings of this Court in racial cases wherein the existence of a presumptively legitimate governmental purpose did not foreclose but rather created the need for a constitutional adjudication. Thus in *NAACP* v. *Alabama*, 357 U.S. 449, *Bates* v. *Little Rock*, 361 U.S. 516, and in *NAACP* v. *Button*, 371 U.S. 415, the states urged the existence of legitimate and traditional state purpose in the areas of foreign corporate registration, taxation, and limitation of litigation. In each case, however, this Court found constitutional violation, notwithstanding the asserted state interest. In like vein, this Court found violations of equal protection, notwithstanding the existence of presumptively legitimate state purpose, in *Shelley* v. *Kraemer*, 334 U.S. 1, *Terry* v. *Adams*, 345 U.S. 461, *Pennsylvania* v. *Board of Trusts*, 353 U.S.

230, *Gomillion* v. *Lightfoot*, 364 U.S. 339, and *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715. See also *Steele* v. *Louisville & Nashville RR Co.*, 323 U.S. 192. In these cases, the states asserted "neutral" operation of otherwise unassailable state functions—judicial enforcement of property covenants, maintenance of a political primary system, public encouragement of education, defining city limits and licensing of restaurant facilities at public premises. Yet in each case, though the state's "purpose" may have been presumptively beneficial, its conduct was found to encourage and support racial discrimination and thus held subject to constitutional prohibition.[12]

All of the foregoing considerations are foreclosed by the ruling of the Illinois Supreme Court in the sensitive area of housing segregation. That Deerfield was and remains an all-white community, that continuing segregation has been the predicate of the governmental supportive action, is all foreclosed from judicial consideration by the ruling below. The back door to community segregation through exercise of public powers such as eminent domain has thus been opened wide. We submit that there is accordingly pre-

---

[12] This is precisely the point at which the Supreme Court of Illinois was led into error. The Court blandly announced that "the condemnation of land for park purposes, is a legitimate and laudable municipal function" (p. 35, *infra*). In closing its eyes to anything beyond this laudable function, it failed to follow the rationale of this Court's decisions in the cases cited in the body. And its error is compounded by its effort to distinguish *Gomillion* on the ground that there "the inescapable illegal purpose [was found] from the act itself" (p. 35, *infra*). For nothing in the Fourteenth Amendment or this Court's decisions has ever suggested that discrimination must appear on the face of the act itself.

Put another way, the error of the Supreme Court of Illinois can be seen from its statement in its first opinion (p. 36, *infra*) limiting petitioner to a showing "that the land sought to be taken, is sought not for a necessary public purpose, but rather for the sole purpose of preventing Progress from conducting a lawful business." But under the cases cited in the text, it is not the duty of one claiming a denial of equal protection to negative the existence of any vital state purpose.

sented for this Court, in a significant and sensitive area of national concern, a case compelling of review.

**The Undisputed Record Herein Demonstrates an Overwhelming Case of Constitutional Infringement**

We believe that this Court will want to review a ruling which, in the important area of housing, serves as an open invitation to community segregation through the use of eminent domain authority insulated from judicial safeguards. This is particularly so in view of the strength and clarity of the demonstration of a constitutional infringement in Deerfield, Illinois. And here it appears undeniable that the parks which are to replace petitioner's integrated housing projects, were *occasioned by, were built upon, resulted in, and were achieved through, racial discrimination.* Condemnation was occasioned by the November 11th news that Progress intended to construct an integrated housing project. Condemnation was made possible by the Deerfield authorities building upon and utilizing the racial antagonisms of the community. The impact and the effect of the condemnation action were clearly discriminatory. And finally, the obvious purpose and actions of the citizenry of Deerfield to discriminate against Progress and the Negroes whom it would one day serve, were totally interwoven with the action of the Village authorities. Whether considered jointly or separately, these circumstances infected the condemnation at issue with unconstitutional racial discrimination.

The sequence of events from November 11 to December 24 leaves no slightest doubt that, but for the November 11th news concerning Negroes, petitioner's property would never have been subjected to this condemnation action: (1) the integration news spread like wildfire; (2) within thirty-six hours the public authorities stopped all petitioner's construction; (3) repeated Village protest meetings culminated in citizen demand for condemnation; (4) the

Park Board took steps leading toward condemnation; (5) the openly racist Residents Association, enlisted by the Park Board, took a community poll showing overwhelming hostility to Negro residents at Floral Park; (6) the following day the Park Board voted to acquire the land and to hold a referendum; (7) the Residents Association delivered the Park Board's offer of purchase to Progress; (8) the citizens voted at the referendum to finance the taking of the land; (9) the Park Board immediately instituted this condemnation action.

In every sense the proposal for public parks at petitioner's housing sites was wholly dependent upon and created from the community's hostility toward Negro occupancy. The joint participation between the various public authorities of the community and the private citizens overtly bent upon preventing desegregation, was continuous and intimate from the first moment that the news broke until the final step in the public taking. *Joint participation existed at every stage:* when the Village authorities on the evening of November 11 set the wheels in motion for an immediate stop order on construction; when a statement of the Village Board of Trustees, read at a Village meeting, gave official expression to the feeling that integration would affect "property values"; when the hastily formed and openly racist Residents Association and its leader attended and dominated the various community meetings; when the day after the Residents Association public poll showed an 8 to 1 sentiment against integration, the Park Board summarily exercised its condemnation power and ordered a referendum; when the Park Board turned over the legal offers to purchase the sites to the Residents Association for delivery to petitioner; when the Residents Association appealed to the community on racial grounds to adopt the referendum; when the public officials and the racists met at the Park Board President's home on the evening of the vote to hear the election returns and reap

the benefits of their cooperation. What we have here is a "common undertaking" which the state trial court expressly recognized (R. 280) — an undertaking between public officials, private citizens and the total community of Deerfield, to resist Negro occupancy by exercise of the power of eminent domain.

It is not now necessary to determine which of this Court's previous authorities most clearly applies to the constitutional violation here so forcefully demonstrated.[13] Certainly, discrimination was here effected under "color of law"; the public officials of the community were active and knowing participants in the process leading to public condemnation which preserved continuing segregation in Deerfield. And while it is clear that the public authorities had the discriminatory purpose revealed by their conduct,[14] this Court need not reach that issue to find a constitutional violation on the present record. For the Court has made clear in a line of rulings that the guarantee of equal protection may be transgressed by governmental conduct falling far short

---

[13] Indeed, we are not unmindful of this Court's observation in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722, that "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'this Court has never attempted' ", because "only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

[14] In the light of their knowing exploitation of racial considerations, the Park Board members cannot be heard to say that they were motivated solely by a desire "to acquire needed park lots for all of Deerfield" and were "not opposed to integration" (R. 278-279). The overt facts speak louder than self-serving declarations of motive. ". . . mere assertions of public officials that there has not been discrimination will not suffice." *Reece* v. *Georgia*, 350 U.S. 85, 88. Such assertions cannot be accepted as a refutation of a discriminatory situation evident from overt facts; otherwise equal protection "would be but a vain and illusory requirement." *Norris* v. *Alabama*, 294 U.S. 587, 598. See also *Hernandez* v. *Texas*, 347 U.S. 475, 481-482; *Eubanks* v. *Louisiana*, 356 U.S. 584, 587.

of a demonstrated governmental purpose to discriminate. Certainly, no one could have imputed such purpose to the public authorities in *Terry* v. *Adams*, *Shelley* v. *Kraemer*, *Pennsylvania* v. *Board of Trusts*, *Burton* v. *Wilmington Parking Authority*, and similar cases. It is not because government is racially motivated that the Fourteenth Amendment is transgressed in such instances. Rather, in the words of the *Burton* ruling, the controlling consideration is that the Constitution is transgressed when "to some significant extent the State in any of its manifestations has been found to have become involved" with racial discrimination. See also *United States* v. *McElveen*, 180 F. Supp. 10, 14 (E. D. La.) affirmed, 362 U.S. 58.[15]

Certainly too, the governmental involvement and interplay with racial discrimination and racial discriminators were in this case more continuous, intimate and necessary to the maintenance of segregation, than in any of the aforementioned adjudications of this Court. The governmental action in issue was not merely supportive of racial discrimination; it was the indispensable prerequisite to achieving the community purpose of preventing Negro occupancy in Deerfield.[16]

---

[15] "The action of the defendant Registrar in giving effect to the mass challenges of the individual defendants achieved a discriminatory result in violation of his duties under the 15th Amendment. Whether or not he had the racially discriminatory purpose which motivated the action of the individual defendants and the defendant Citizens Council is irrelevant as a matter of law." The United States in its brief before this Court, echoed the view of the District Judge, pointing out that the intent of the public officer is irrelevant and "what matters is the fact of discrimination through state conduct," because the "touchstones" of state action in such cases are the elements of "acquiescence, recognition and enforcement by the state of essentially private discrimination" (at pp. 16, 26-27).

[16] This consideration invokes also the lines of constitutional authority precluding foul means to achieve public ends. It is a fundamental tenet of our Constitution that governmental objectives may be achieved only by

In sum, the decision of the Supreme Court of Illinois not merely espouses a clearly erroneous and nationally dangerous standard of judicial review under the Fourteenth Amendment; it does so in a case involving the clearest kinds of state involvement with, support to and enforcement of, racial discrimination. The clarity of the equal protection violation must therefore be added as a reason for review to the dangerously inadequate standard of constitutional scrutiny adopted by the court below in an area of vital national signficance.

## CONCLUSION

It is respectfully submitted that the condemnation approved by the Supreme Court of Illinois fails to afford that protection to Negro Americans which is contemplated by the Fourteenth Amendment. All that has been "protected" in Deerfield is its continuing viability as an all-white community. When such protection derives from the

---

fair and orderly process. Under the Fourteenth Amendment the existence of a valid objective of governmental action does not itself validate whatever means are used to achieve the governmental objective, nor permit the use of means which violate specific constitutional prohibitions. Thus, governmental action, whether legislative or executive, which has a presumptively valid objective, nevertheless falls if the means toward the achievement of the goal violate the guarantees of liberty, equality, or procedural due process. Even if, therefore, it were assumed for sake of argument that a governmental condemnation is not tainted by any racial purpose of the officials who undertake it, yet if the means for its achievement is official resort to racial animosity, the action must fall under the Fourteenth Amendment. In this respect, the guarantees of equal protection and procedural due process coalesce. "The concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Bolling* v. *Sharpe*, 347 U.S. 497, 499. And see *Griffin* v. *Illinois*, 351 U.S. 12, 17, where this Court ruled that "due process and equal protection both call for procedures . . . which allow no invidious discriminations. . . ."

public act of condemnation, brought about by a common undertaking of public authority and private citizenry, this Court cannot remain aloof.

For the foregoing reasons, it is submitted that the writ of certiorari should be granted.

Respectfully submitted,

JOSEPH L. RAUH, JR.,
EUGENE GRESSMAN,
JOHN SILARD,
*1625 K Street, N.W.,*
*Washington 6, D. C.*

JOHN W. HUNT,
RICHARD G. KAHN,
HOWARD HOOSIN,
JOHN P. MORRIS,
*135 South LaSalle Street,*
*Chicago 3, Illinois*
*Attorneys for Petitioner.*

February, 1963

## APPENDIX A

DEERFIELD PARK DISTRICT, APPELLEE, v. PROGRESS DEVELOPMENT CORPORATION ET AL., APPELLANTS.

(April 26, 1961)

Mr. JUSTICE SOLFISBURG delivered the opinion of the court:

This is an appeal from a judgment of the trial court in consolidated condemnation cases on June 28, 1960, ordering that title to certain real estate vest in the petitioner, the Deerfield Park District, (hereinafter called Park District), upon their depositing the sum of $168,500 with the county treasurer of Lake County. By this appeal, defendants, Progress Development Corporation and Chicago National Bank, as trustee, (hereinafter referred to jointly as Progress), seek to set aside the judgment and overrule the motion of the Park District to strike portions of defendants' traverse or motion to dismiss. No question is raised as to the amount of just compensation for the land taken which was stipulated in the trial court.

Stripped of the epithetical rhetoric of the parties the sole question before this court is the scope and extent of the issues which may properly be submitted to the trial court in a condemnation proceeding. However, a decision of this question necessitates a review of the proceedings both in the trial court and Federal courts, together with the prior history of this controversy.

Beginning in April, 1959, and subsequent thereto, Progress acquired for residential development two unimproved tracts of real estate in the village of Deerfield, Lake County, Illinois. One tract of approximately fifteen acres became known as Floral Park Subdivision and the other tract of approximately seven acres, as Pear Tree Subdivision.

On July 8, 1959, the plat of Floral Park Subdivision

was duly approved by the Deerfield village board. This plat was properly recorded on July 31, 1959, and provided for 39 residential lots. Thereafter, Progress commenced the installation of water, sewer and street improvements and the construction of two model homes with village board approval.

On September 16, 1959, the plat of Pear Tree Subdivision was approved by the Deerfield village board and was recorded on September 18, 1959. This plat provided for twelve home sites.

On December 7, 1959, the Deerfield Park Board took formal action to designate Floral Park and Pear Tree subdivisions as park sites and ordered that they be acquired by condemnation proceedings for park purposes. Plaintiffs rejected an offer of the Park Board to purchase these subdivisions for $166,199.91. In the same meeting the Park Board, by proper resolutions, provided for a referendum to be held on December 21, 1959, for the purpose of submitting to the voters of Deerfield a $550,000 bond issue, $175,000 of which was designated for the purchase of the two subdivisions owned by Progress. The remainder of the bond issue was to cover the acquisition of four other park sites of approximately 58 acres, making a total of approximately 80 acres in the six tracts.

On December 21, 1959, the bond issue referendum was held. The election carried, and the bond issue was approved by the voters.

The following day Progress, and their parent corporation, Modern Community Developers, Inc., instituted suit in the United States District Court against the Park District, the village of Deerfield, and their respective boards, together with other individuals. The complaint alleged a conspiracy to deprive plantiffs of their civil rights, and sought to enjoin the Park District from condemning the land; the village from unlawful enforcement of their build-

ing code; and further sought damages against all defendants. *Progress Development Corporation* v. *Mitchell*, 182 F. Supp. 681.

At the same time Progress and Modern sought a temporary restraining order from the United States District Court against the Park Board and the village trustees. The order was granted as to the village trustees but denied as to the Park Board. Two days later, on December 24, 1959, the Park District filed the present condemnation petition.

By agreement the condemnation proceedings were held in abeyance until hearings in the United States District Court were concluded.

On March 4, 1960, the United States District Court denied injunctive relief and dismissed the complaint of Progress and Modern and granted summary judgment thereon and they appealed.

Thereafter on March 11, 1960, Progress filed a motion to dismiss the condemnation petition on five grounds:

1. That a prior action is pending between the petitioner and one of the defendants in the United States District Court invoiving the same subject matter.

2. That the filing of the condemnation petition is an overt act in a conspiracy to deprive Progress of its civil rights.

3. That there is no *bona fide* public need for acquisition of this property for public use.

4. That petitioner did not negotiate or bargain in good faith.

5. That the acts of the petitioner in conspiracy with others are abuses of the power of eminent domain.

In support of the motion, Progress attached a copy of their complaint in the United States District Court. The same day the Park District moved to strike grounds 1, 2, and 5 of the motion to dismiss and filed an answer to grounds 3 and 4. The trial court granted the motion to

strike grounds 1, 2 and 5 and, finding grounds 3 and 4 constituted a traverse of the petition to condemn, set the same for hearing.

Upon the hearing the Park District introduced evidence of its resolutions designating these areas as necessary park sites and authorizing their acquisition. They further proved offers to purchase and their refusal. Progress then submitted a 50-paragraph request for admission of facts which appears to have been treated below as an offer of proof. Objections thereto were sustained.

The gist of the rejected offer of proof is that Progress follows a policy of building homes for sale to Negroes and white persons; a policy first revealed to the general public on November 11, 1959. Prior to July, 1959, there were "For Sale" signs on the property; and the Park District did not contact the owner. The Park District and the local school board had many meetings with regard to school and park and swimming pool sites prior to November 11, 1959, but no discussion was had or acquisition attempted in relation to Floral Park or Pear Tree, until the public disclosure of the controlled occupancy policy of Progress.

Progress offered no further proof, and the parties stipulated as to the fair market value of the premises, and the order of condemnation was entered.

During the pendency of this appeal, the United States Court of Appeals for the Seventh Circuit, affirmed the orders of the district court denying plaintiffs' motion for a preliminary injunction; but reversed the orders and judgment dismissing the complaint and granting summary judgment thereon. The cause was remanded for a trial on the merits. The court also denied a motion for mandatory injunctive relief. *Progress Development Corporation* v. *Mitchell*, Doc. 12976, January 4, 1961, ———— Fed. 2d————.

On this appeal, Progress insists that they have been

denied a right to a hearing in the trial court on their charges that the present condemnation proceeding is a part of a conspiracy to deprive Progress of their civil rights.

The Park District, however, maintains that the issues of conspiracy and a denial of civil rights can only be adjudicated in the forum of Progress's choice, the Federal courts; and that the Park District sufficiently proved below the necessity for condemnation.

It is conceded, as it must be, that every private owner of property holds his title subject to the lawful exercise of the sovereign power of eminent domain, and courts may not substitute their judgment for that of the condemning authority in inquiring into the necessity and propriety of the exercise of the power. *School Trustees* v. *Sherman Heights Corp.* 20 Ill.2d 357; *County Board of School Trustees* v. *Batchelder*, 7 Ill.2d 178.

Nevertheless the power of eminent domain, great as it is, is subject to constitutional limitations, and the courts may interpose their authority to prevent a clear abuse of the exercise of that right. *Department of Public Works and Buildings* v. *Lewis*, 411 Ill. 242; *City of Chicago* v. *Vaccarro*, 408 Ill. 587; *Tedens* v. *Sanitary District of Chicago*, 149 Ill. 87.

It is also well settled that State power cannot be used as an instrument to deprive any person of a right protected by the Federal constitution. *Gomillion* v. *Lightfoot*, 362 U.S. 916, 5 L. ed. 2d 110; *Shelley* v. *Kraemer*, 334 U.S. 1, 92 L. ed. 1161; *Aaron* v. *Cooper*, 358 U.S. 3, L. ed. 2d 1.

If, therefore, the Park District's attempted exercise of the power of eminent domain would deprive Progress of equal protection of the law, it is the duty of the Illinois courts to prevent it. We do not think the resort of Progress to the Federal forum absolves the tribunals of this State from the duty of protecting their rights.

The present status of the Federal proceedings merely de-

termines that Progress has failed to show sufficient ground for the issuance of a temporary Federal writ to stay the Illinois condemnation proceeding. There is at this time no final adjudication of the question of law regarding Progress's purported defense to condemnation.

The time was ripe to determine the validity of the defense in the trial court, and it was of necessity so determined by the judgment order.

The issues before us therefore narrow to two questions. (1) Did the stricken counts of the motion to dismiss contain allegations of fact which if proved would constitute a defense to the petition? (2) Did the offer of proof upon the traverse constitute a good defense?

We have carefully examined the motion to dismiss and the district court complaint which apparently is incorporated therein by reference. Viewed together they are replete with unsupported conclusions and voluminous allegations of fact which appear to be completely immaterial to any issue in this case. However, we think that the 42-page complaint contains allegations sufficient to charge the Park District with using its power of eminent domain for "the sole and exclusive purpose" of preventing the sale of homes by Progress to Negroes in violation of Progress's right to equal protection of the law.

We consider such a charge, if proved, to be a denial of the necessary prerequisites to condemnation of necessity and public use, and therefore a defense to the petition.

This conclusion, however, does not mean that all, or even a substantial part of the matters alleged by Progress are material to this inquiry. We think it of no importance that the citizens of Deerfield, and even a member of the Park District board were opposed to the policy of controlled occupancy adopted by Progress. Nor is the fact that steps to acquire this land were not taken prior to Progress's announcement of its policies material here.

The material questions of fact are whether or not Deerfield needed park sites; whether or not Progress's property is suitable for park sites; and whether or not these sites will be devoted to public use. On these issues the Park District has made a *prima facie* case. *School Trustees* v. *Sherman Heights Corp.* 20 Ill.2d 357.

It then became incumbent upon Progress to rebut the *prima facie* case by material evidence. Progress, however, seems to argue that the facts which they have offered to prove would sufficiently rebut the Park District case. In this contention they rely on the recent case of *Gomillion* v. *Lightfoot,* 362 U.S. 916, 5 L. ed. 2d 110. As we have noted before, the teaching of that case is relevant here, but we think the facts are inapposite. The *Gomillion* case involved a suit for declaratory judgment by several Negroes claiming that Local Act 140 of the Alabama legislature was invalid on the ground that it deprived them of certain constitutional rights. Act 140 redefined the territorial limits of the city of Tuskegee, converting its shape from square to an "uncouth twenty-eight sided figure." All but four or five of approximately 400 qualified Negro voters were thereby excluded from the municipality while none of approximately 600 white voters were removed.

The United States Supreme Court, in striking down the redistricting, said:

"These allegations, if proven, would abundantly establish that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering. If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.

"The complaint amply alleges a claim of racial discrimination. Against this claim the respondents have never suggested, either in their brief or in oral argument, any countervailing municipal function which Act 140 is designed to serve."

In the case at bar, the faction protested—the condemnation of land for park purposes, is a legitimate and laudable municipal function. The designation of Progress's land as a park site and its acquisition, standing alone, contains no such irresistible mathematical demonstration of illegal purpose as contained in the Alabama legislation.

In *Gomillion*, the United States Supreme Court did not engage in any metaphysical investigation into the motives of the legislators. They found the inescapable illegal purpose from the act itself. From an examination of the record in the case at bar, it is apparent that many of the allegations of Progress are framed for the purpose of directing a judicial inquiry into the motives of the individual members of the Park District Board, rather than into the actual purpose for which this land is sought. This is clearly an inappropriate area for judicial inquiry. (*Detroit United Railway* v. *City of Detroit*, 255 U.S. 171, 178, 65 L. ed. 570; *Soon Hing* v. *Crowley*, 113 U.S. 703, 710-711, 28 L. ed. 1145; *Sinclair Refining Co.* v. *City of Chicago*, (7th cir.) 178 F.2d 214, 217.) As we stated in *Ligare* v. *City of Chicago*, 139 Ill. 46, in a condemnation case the purpose for which the power of eminent domain is exercised may be questioned, but "the motives that may have actuated those in authority are not the subject of judicial investigation."

We cannot see how the rule could be otherwise. If parks are needed in Deerfield, and if the land so selected for them is appropriate for that purpose, the power of eminent domain cannot be made to depend upon the peculiar social, racial, religious or political predilections of either the condemning authority or the affected property owner. Progress is entitled to the same opportunity to hold land and

operate a business as anyone else. They, like all others, hold their land subject to the lawful exercise of the power of eminent domain. They like all others are entitled to show, in a condemnation proceeding, that the land sought to be taken, is sought not for a necessary public purpose, but rather for the sole purpose of preventing Progress from conducting a lawful business. *Cf. Progress Development Corporation* v. *Mitchell,* (7th cir.) Doc. 12976, folio 19, 286 F.2d 222.

In the light of these observations, we must consider the record below. We think that any proper proof on the issue of the right of condemnation could have been presented on the pleadings before the trial court on the hearing on the traverse. If by the trial court's ruling, it was intented to strike the allegation and deprive Progress of the right to prove by material facts that the exercise of eminent domain in the instant case was not necessary, and was not to be devoted to a public use, but was for the sole purpose of depriving Progress of the right to do business, then the ruling was in error. We have carefully examined the record, and while we feel that Progress's offer of proof was in poor form, and to large degree immaterial, the colloquy in the trial court, and the briefs and argument before us indicate a restriction on the right of Progress to prove a lack of necessity and public purpose. From the record as a whole we feel that justice will be served in reversing the judgment of the trial court and remanding the cause for the sole purpose of permitting Progress a full hearing on the question of whether this taking is necessary and for a public purpose.

*Reversed and remanded, with directions.*

## APPENDIX B

DEERFIELD PARK DISTRICT, APPELLEE, v. PROGRESS DEVELOPMENT CORPORATION *et al*, APPELLANTS

(November 30, 1962)

MR. JUSTICE HERSHEY delivered the opinion of the court:

This is an appeal from a judgment of the circuit court of Lake County in a condemnation proceeding ordering that title to certain real estate vest in the petitioner, the Deerfield Park District, in confirmance of a prior order and denying the motion of Progress Development Corporation to dismiss the condemnation suit. The appeal is taken directly to this court under section 12 of the Eminent Domain Act, Ill. Rev. Stat. 1961, chap. 47, par. 12.

This is the second time this case has been before us on appeal. On the prior appeal this court remanded the cause to the trial court for the sole purpose of permitting Progress a full hearing on the question of whether the taking was necessary and for a public purpose, 22 Ill. 2d 132.

The opinion in the prior appeal sets forth the facts in detail, and only a brief statement of them need be made here. In April 1959, and subsequent, Progress Development Corporation, a private corporation, acquired for residential development two unimproved parcels of real estate in the village of Deerfield, Illinois. One tract of approximately 15 acres was known as Floral Park, and the other tract, of approximately 7 acres, as Pear Tree. These subdivisions were platted and Progress commenced installation of water, sewer and street improvements and the construction of two homes in Floral Park Subdivision. Thereafter, the plat of Pear Tree Subdivision was approved. On December 7, 1959, the Deerfield Park Board ordered the condemnation of these two areas for park purposes. Appelants rejected an offer of the Park Board to purchase these subdivisions for $166,199.91. A referendum was held Decem-

ber 21, 1959, on a $550,000 bond issue to purchase these two tracts and four other park sites. The election carried. The following day, Progress and others sought a temporary restraining order in the United States District Court against the Park District, the village of Deerfield, their respective boards, and others, contending a conspiracy existed among those defendants to deprive plaintiffs in that action of their civil rights and seeking to enjoin the Park District from condemning the land and for other relief. The temporary restraining order was denied as to the Park Board.

Two days later this condemnation suit was filed. Progress filed a motion to dismiss the condemnation petition. The court granted the motion of the Park District to strike parts of the motion to dismiss and held a hearing on the grounds of the motion that there was no *bona fide* public need for acquisition of this property for public use and that petitioner did not negotiate or bargain in good faith. The proof offered by Progress was a 50-paragraph request for admission of facts which was objected to and which the court rejected.

This court remanded the cause on the prior appeal due to the restrictions on proof placed upon appellants in the trial court. We there held that "If by the trial court's ruling, it was intended to strike the allegation [that the Park District used its power of eminent domain for the sole and exclusive purpose of preventing the sale of homes by Progress to Negroes in violation of Progress's right to equal protection of the law] and deprive Progress of the right to prove by material facts that the exercise of eminent domain in the instant case was not necessary, and was not to be devoted to a public use, but was for the sole purpose of depriving Progress of the right to do business, then the ruling was in error." 22 Ill.2d 132 at 141.

On remand, the question was whether the taking was necessary and for a public purpose. As we stated in the

prior opinion, it is conceded, as it must be, that every private owner of property holds his title subject to the lawful exercise of the sovereign power of eminent domain, and the courts may not substitute their judgment for that of the condemning authorities in inquiring into the necessity and propriety of the exercise of the power.

On retrial the Park District introduced testimony of a professional park planner, of the park commissioners, and resolutions of the Park Board. This testimony clearly established that the taking is necessary for park purposes. The park planner testified he was employed to and did make a survey of the park district to determine suitable property for park purposes and that he made a report to the Park Board recommending acquiring these two sites before Progress had acquired any land. Floral Park was shown to be some 15 acres, fairly level, somewhat wooded, an excellent site to serve the population area, and is located across from the Wilmot School. Likewise, the Pear Tree Subdivision will serve a need for providing a park upon which a swimming pool can be located, as there is no swimming pool in the entire park District, which includes the entire community of Deerfield. It was shown these were the only available sites where vacant land could be obtained for park purposes in the western one-third of the Park District.

Four park commissioners testified in detail as to the proper location of the properties, the need for park development to provide better physical play area, football, baseball, apparatus, and for the general normal functions of the Park District, as well as to provide a swimming pool.

No attempt was made by Progress to contradict, vary or minimize the testimony on behalf of the Park District showing the taking was necessary and for a public purpose. In this state of the record, the Park District has sufficiently shown the need and necessity for the land in

question for public parks. These are the matters for which the previous remand was made and the facts have been sufficiently proved. As we stated in our prior opinion (p. 140): "the motives that may have actuated those in authority are not the subject of judicial investigation."

Nevertheless, we must say in passing that Progress has had a full hearing, and as trial judge said, "with the evidence door thus opened to its widest point," there is no evidence that any member of the Park Board formed or engaged in any conspiracy to deprive Progress of any of its legal rights. No violation of the fourteenth amendment to the constitution of the United States is here involved.

As was said by this court in the prior opinion (p. 140): "If parks are needed in Deerfield, and if the land so selected for them is appropriate for that purpose, the power of eminent domain cannot be made to depend upon the peculiar social, racial, religious or political predilections of either the condemning authority or the affected property owner. Progress is entitled to the same opportunity to hold land and operate a business as anyone else. They, like all others, hold their land subject to the lawful exercise of the power of eminent domain."

The evidence clearly shows parks are needed in Deerfield and that the land condemned is appropriate for that purpose. Progress has had a full hearing and opportunity to refute this proof and did not. The decision of the trial judge was correct.

*Judgment affirmed.*

## APPENDIX C

UNITED STATES OF AMERICA

STATE OF ILLINOIS
SUPREME COURT } ss.

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the twelfth day of November in the year of our Lord, one thousand nine hundred and sixty-two, within and for the State of Illinois.

Present:

Roy J. Solfisburg, Jr., Chief Justice
Justice Joseph E. Daily
Justice Harry B. Hershey
Justice Byron O. House
Justice Walter V. Schaefer
Justice Ray I. Klingbiel
Justice Robert C. Underwood
William G. Clark, Attorney General
Robert G. Miley, Marshal

Attest:

Mrs. Earle Benjamin Searey, Clerk

BE IT REMEMBERED, that to-wit: on the 30th day of November, 1962, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

| | |
|---|---|
| Deerfield Park District Lake County, Illinois, a body crporate and politic, *Appellee,* vs. Progress Development Corporation, an Illinois corporation, et al., *Appellants.* | Appeal from Circuit Court, Lake County. 71780. |

No. 37100

And now, on this day, this cause having been argued by

counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

THEREFORE, it is considered by the Court that the judgment of the Circuit Court of Lake County aforesaid, Be Affirmed in all things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellants costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Mrs. Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

Office Supreme Court, U.S.
FILED
APR 1 1963
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962.

**No. 871**

PROGRESS DEVELOPMENT CORPORATION,
*Petitioner,*

*vs.*

DEERFIELD PARK DISTRICT,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GERALD C. SNYDER,
301 Washington Street,
Waukegan, Illinois,

ALLYN J. FRANKE,
100 West Monroe Street,
Chicago 3, Illinois,
*Attorneys for Respondent.*

THE BLAKELY-HARBER PRINTING COMPANY, CHICAGO

# INDEX.


| | PAGE |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Constitutional and Statutory Provisions | 2 |
| Statement | 2 |
| What Happened in Deerfield Up to November 11, 1959 | 5 |
| What Happened in Deerfield After November 11, 1959 | 8 |
| Progress Development Corporation's "Controlled Occupancy Pattern" | 10 |
| Summary of Argument | 13 |
| Reasons for Denying the Writ | 14 |
| A. The Decision of the Trial Court Was Based Solely on a Question of Fact | 14 |
| B. Under the Separation of Powers, the Power of the Judicial Branch to Proceed in This Case Has Been Exhausted | 18 |
| C. The State Courts Decided This Case in Accordance With Applicable Decisions of This Court | 20 |
| 1. The Motives of the Body Exercising Legislative Discretion Cannot Be Inquired Into by the Judiciary | 20 |
| 2. Public Use and Necessity Are Not Affected by the Landowner's Proposed Use of the Property | 24 |
| 3. The Landowner Is Not Seeking Equal Protection—It Is Seeking a Preferred Status | 25 |
| Conclusion | 31 |
| Appendix | A-1 |

TABLE OF CASES.

Barry v. Legler, 39 F. (2d) 297 ..... 14, 15
City of Chicago v. R. Zwick Co., Ill. Sup. Ct. Docket Nos. 37652 and 37653 ..... 23
Detroit United Railway v. City of Detroit, 255 U. S. 171 ..... 21
Fletcher v. Peck, 6 Cranch 87 ..... 20, 21, 23
Georgia v. City of Chattanooga, 264 U. S. 472 ..... 18
Gomillion v. Lightfoot, 364 U. S. 339 ..... 24
Henderson v. United States, 339 U. S. 816 ..... 28
Hughes v. Superior Court, 339 U. S. 460 ..... 28
Joslin Mfg. Co. v. City of Providence, 262 U. S. 668 ..... 19
Kohl v. United States, 91 U. S. 367 ..... 18, 25
Progress Development Corporation v. Mitchell, 182 F. Supp. 681 ..... 1, 4, 16
Progress Development Corporation v. Mitchell, 286 F. 2d 222 ..... 1, 11, 16, 17, 27
Rindge Co. v. Los Angeles County, 262 U. S. 700 ..... 19, 20
Rohlfing v. Cat's Paw Rubber Co. (U. S. D. C. N. D. Ill. E. D., 1954), 17 F. R. D. 426 ..... 14
Soon Hing v. Crowley, 113 U. S. 703 ..... 21, 22
Taylor v. Leonard, 103 A. 2d 632 (N. J., 1954) ..... 29
Trustees of Schools v. Sherman Heights Corp., 20 Ill. 2d 357, 169 N. E. 2d 800 ..... 3
United States v. Lynah, 188 U. S. 445 ..... 19
United States v. Yellow Cab Co., 338 U. S. 338 ..... 14, 15

MISCELLANEOUS.

Ch. 105, Sec. 8-1, Ill. Revised Stats., 1961 ..... 2
President John F. Kennedy, March 9, 1961 ..... 4
Wall Street Journal, August 13, 1962 ..... 12

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962.

---

**No. 871.**

---

PROGRESS DEVELOPMENT CORPORATION,
*Petitioner,*

*vs.*

DEERFIELD PARK DISTRICT,
*Respondent.*

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

---

*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

### OPINION BELOW.

The opinion of the learned trial judge is not appended to the Petition, as required by Rule 23.1.(i). This opinion was affirmed, without change, by the Illinois Supreme Court. It is essential to an understanding of the issues of this case. It is reproduced in the Appendix hereto at pp. A-1 to A-37.

The attention of the Court is likewise directed to *Progress Development Corporation* v. *Mitchell*, 182 F. Supp. 681, and *Progress Development Corporation* v. *Mitchell*, 286 F. 2d 222, where the same conspiracy issue was heard.

## JURISDICTION.

No constitutional question is involved. Illinois Courts decided a question of fact.

## QUESTION PRESENTED.

Did the Illinois Courts correctly hold that there is no evidence that any member of the Park Board formed or engaged in any conspiracy to deprive Progress Development Corporation of any of its legal rights, and that no violation of the Fourteenth Amendment to the Constitution of the United States is involved?

## CONSTITUTIONAL AND STATUTORY PROVISIONS.

There is no constitutional or statutory provision involved.

No claim is made that the Eminent Domain Act of Illinois is unconstitutional. The charge of conspiracy was a question of fact.

## STATEMENT.

The issues in any case are circumscribed by the pleadings. Progress Development Corporation presented two defenses involving *only* questions of fact; first, that there was no public need for acquisition of the property for public use; second, that the Park Board Members conspired to deprive Progress Development Corporation of its property. (R. 3-5.)

The Deerfield Park District, a municipal corporate body,[1] filed a petition to acquire two parcels of land owned either outright or beneficially, as a beneficiary under a trust, by Progress Development Corporation, an Illinois for

1. Ch. 105, Sec. 8-1, Ill. Revised Stats., 1961.

profit corporation, alleging the need of the land for park purposes. (R. 1-3.) In Illinois a hearing on the property of the taking is required only if a traverse (motion to dismiss) is filed by defendant and the issues are limited to those raised in the traverse.[2] Progress Development Corporation filed a traverse raising two issues: (1) is there a bona fide public need for acquisition of the property for public use, and (2) did the Park Board members conspire with others to deprive Progress Development Corporation of its rights? (R. 3-5.)

The Court held a full hearing, opening the evidence door "to its widest point" for Progress Development Corporation to introduce all evidence "bearing even a tinge of materiality". (R. 249, 250, 252.) The two properties involved herein were the last two available vacant properties in the entire western one-third of the district and had been inspected and selected as sites to be acquired in the future before Progress Development Corporation was heard of. The need and prospective use of these parcels for public purposes was conclusively proved and, in fact, conceded. (R. 115-120, 125, 126, 260, 264, 265, 286.)

From the time the expert park planner had advised the Park Board to acquire these two parcels together with other parcels throughout the district in May, 1959, the Park Board was attempting to secure the approval of the voters to a program of acquiring those park sites recommended by the planner for which the voters would approve funds to purchase. The trial court properly held that the Park Board had called the election in December, 1959 to acquire 6 sites in furtherance of the program originated in the spring of 1959 to provide the Park District with adequate park sites. (R. 119, 120, 156, 157, 278, 286.)

The trial court, in an opinion prepared with obvious

2. *Trustees of Schools* v. *Sherman Heights Corp.*, 20 Ill. 2d 357, 169 N. E. 2d 800.

care, carefully analyzing the evidence and showing the reasons for the findings, held that the evidence showed no proof of a conspiracy of the Park Board members to deprive Progress Development Corporation of its rights. (R. 286.) In fact, the evidence clearly showed that none of the Park Board members had any animosity towards Negroes or integration. (R. 235, 278-279.)

The sole purpose of the condemnation was to acquire for needed park purposes the only two available vacant pieces of property in the entire western one-third of the Park District which would be lost for future park development if acquisition action was delayed. (R. 116, 278.)[3]

The Statement appearing in the Petition at pages 2 through 14 is patterned after the novel cited as an authority at page 14. The Statement is a highly biased presentation, freely drawing from, and perverting evidence in another case, *Progress Development Corporation* v. *Mitchell*, 182 F. Supp. 681, where village officials and numerous individual citizens, not parties to this case, testified. It draws unwarranted conclusions and makes statements of fact completely unwarranted by that testimony or any testimony in this case.

---

3. "Land is the most precious resource in the metropolitan area. The present patterns of haphazard suburban development are contributing to a tragic waste in the use of a vital resource now being consumed at an alarming rate.

"Open space must be reserved to provide parks and recreation, conserve water and nother natural resources, prevent building in undesirable locations, prevent erosion and floods, and avoid the wasteful extension of public services." President John F. Kennedy, March 9, 1961.

**What Happened in Deerfield Up to November 11, 1959.**

The very title of this section of the Petition, appearing at page 3, demonstrates the fundamental approach being made. The inquiry is *not* as to the action of the Park Commissioners. A recitation of meetings of the Board of Trustees, the Deerfield Planning Commission, and members of the school district are detailed and the state of affairs in Deerfield is described as a quiet, normal community.

Nothing is stated about the activities of the Park Commissioners. The proofs in this case show that the Park Commissioners, prior to the time that Progress Development Corporation owned any property, were much concerned because the Deerfield Park District had 47 acres of park land, and in order to properly carry out its functions, it should have 250 acres. (R. 113.)

In the spring of 1959 a professional park planner was employed to make a survey of the entire park district to determine what land was suitable and available for park purposes. In the course of this survey he inspected and walked upon both the properties in this proceeding. Two of the Park Board members likewise inspected these sites at that time. Pursuant to the employment, a report was made to the Park Board in which he specifically recommended the acquiring of the two sites now involved. (R. 112-116, 118, 184, 198.)

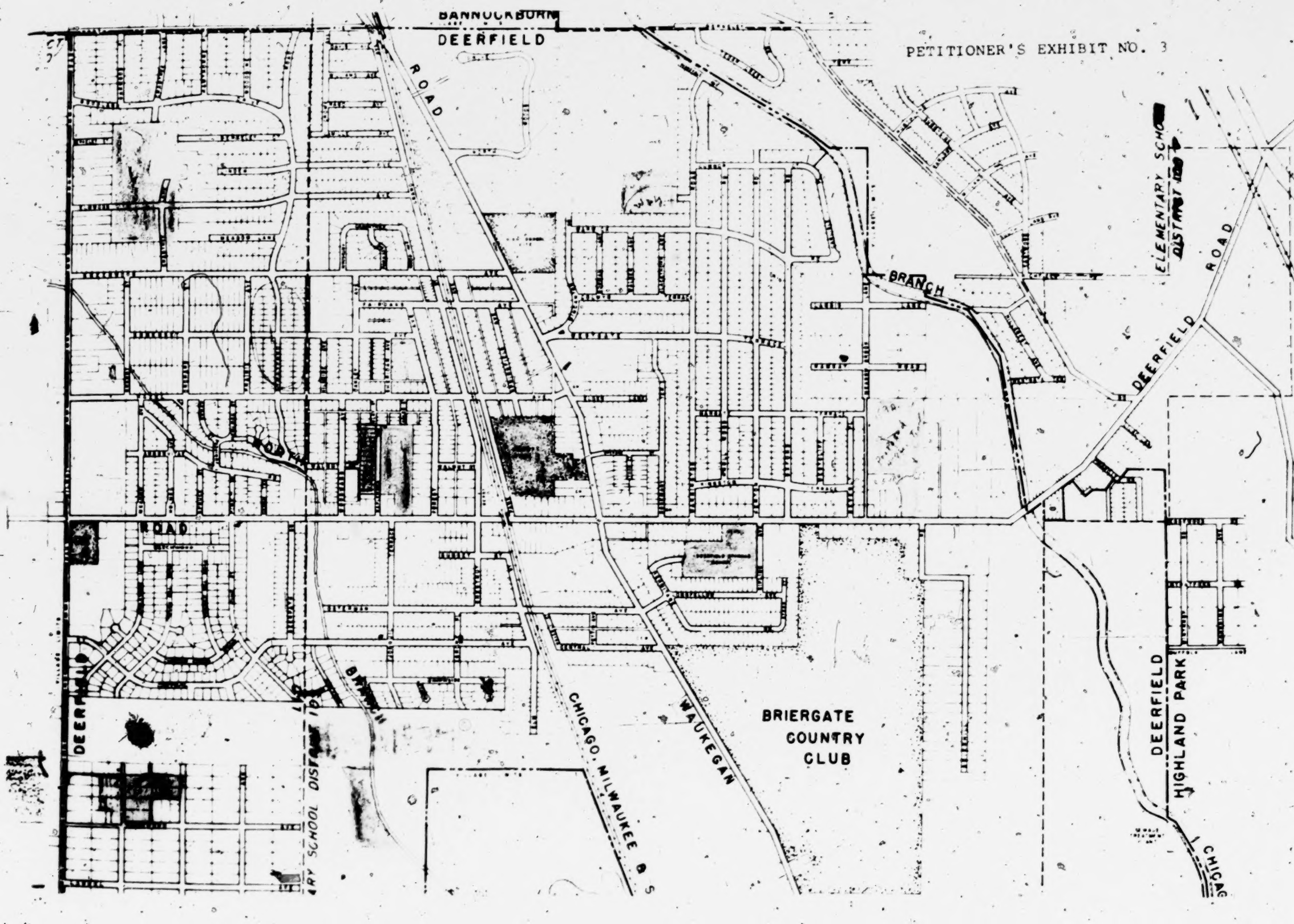
At a meeting of the Park Board in May 1959 some two months prior to the time Progress Development Corporation acquired any real estate in Deerfield, this park planner presented a map indicating property in Deerfield which should be acquired for park purposes. This map was received in evidence and is reproduced on the next

page of this Brief in reduced size. The park planner placed yellow areas on the map indicating land he recommended the Park District acquire for general park purposes. He covered areas pink to indicate land then owned by the Park or School Districts. (R. 119.) The tract of land indicated by the yellow area at the extreme left of the park planner's map is land acquired some two months later by Progress Development Corporation. This was then designated "Floral Park". (Shown opposite this page.) The property this corporation acquired and designated "Pear Tree" was acquired some three months after this park planner gave the Board a written report recommending that a swimming pool site on Wilmot Road be acquired. Three months after that recommendation, Progress Development Corporation acquired that land. (R. 93, 119, 120, 125, 126.) These are the properties involved.

None of the sites recommended by the park planner were considered for purchase at that time, as funds for such purpose would have to be secured from future bond issues. (R. 121, 154, 157, 185.)

The record is clear and undisputed. Floral Park is some 15 acres, fairly level, somewhat wooded, is an excellent site to serve the population area, is located across from Wilmot School and its acquisition is necessary to provide needed park facilities. (R. 113, 114.) Likewise, the Pear Tree site will serve a much needed purpose of providing a park upon which a swimming pool can be located. There is no swimming pool in the entire Park District, which includes the entire community of Deerfield. The erection of a swimming pool is necessary if the Park District is to properly carry out its functions. (R. 115.) It is undisputed that the two sites in question are the only available vacant sites in the entire western one-third of the Park District. (R. 116.)

PETITIONER'S EXHIBIT NO. 3



In addition to the completely undisputed testimony of the professional park planner, four park commissioners testified in detail as to the proper location of the properties, the need for park development to provide better physical play area, football, baseball, apparatus, and for the general normal functions of the Park District, as well as to provide a swimming-pool. (R. 122, 123, 124.) There was no attempt made to contradict, vary or minimize any of this testimony.

The Park District's resolutions were received in evidence. (R. 238, 239, 241, 242.) These resolutions established that the Wilmot park site adjacent to the Wilmot School is not sufficient in size to serve the needs of the residents of the Park District, and will be further reduced in size by additions to be made to the Wilmot School and that the additional park land at the Wilmot Park site is imperative if an adequate park program is to be maintained, and the only vacant land of sufficient size to meet the need is the Floral Park property, and its acquisition is necessary to and required by the Park District to maintain an adequate park program in its district. The other resolution establishes the making of a survey within the Park District of land suitable for park purposes, and that Pear Tree is desirable as a park site to be used as a swimming pool site, and its acquisition is necessary to and required for the building and maintaining of a proper system of parks in the district.

Progress Development Corporation did not contest this evidence. Although it had denied the necessity in the traverse filed, when faced with the proofs which established the *fact*, it then conceded in the Trial Court that the two properties were needed and would be used for public purposes. (R. 260, 264, 265.) In the Petition for a Writ of Certiorari filed before this Honorable Court, at page 18, Progress Development Corporation again states that after

need and suitability for parks was demonstrated, the fact was conceded.

**What Happened in Deerfield After November 11, 1959.**

Again, Progress Development Corporation recites in great detail actions and statements of Deerfield citizens, the Village Board of Trustees, and others, interspersing in the recitation references to Park Board members. No Park Board member attended any of the meetings at the village hall and the American Legion Hall, which are so critically described. The opinion of the Trial Court fully considers the actions of the Park Commissioners. It defines the proofs needed to establish conspiracy and then states:

> "Judged by these standards it is immediately apparent that Progress has offered no evidence whatever which directly or indirectly involves three of the members of the Park Board in the claimed conspiracy. As shown by their testimony in the Federal Court proceedings (admitted by stipulation here) commissioners Dewey and Petersen did not attend any of the meetings or participate in any way in any of the activities which Progress now questions. The only evidence as to the other commissioner in this group, Keller, is that he wrote a letter to a Deerfield paper which was published on November 26, 1959, objecting to the manner in which Progress was attempting to 'foist' its ideas upon the Deerfield community and again stated these same views at two public meetings which he attended. If the mere expression of common views is enough to constitute one a member of a conspiracy without some further evidence of participation in a common unlawful design then no member of the public would be safe in expressing his opinion on any controversial subject. The Supreme Court of Illinois in its opinion in the appeal taken in this case made this comment on this type of evidence at pages 138 and 139: 'We think it of no importance that the citizens of Deerfield and even a member of the Park District Board were opposed to

the policy of controlled occupancy adopted by Progress.' (22 Ill. (2d) 132.) Apparently Progress itself did not attach any particular significance to these statements because these activities of Keller were not even mentioned in the summary furnished by it.

"Progress had singled out only two members of the Park Board who are particularly charged with furthering the alleged conspiracy, the Board president Mitchell and the member Walchli. The principal conspirational activities charged against these two are—

1. They participated in private meetings of the Residents Association at the home of John Jursich on December 3rd and 7th, 1959.

2. They participated in a private meeting at Joseph Powell's home on December 6th, 1959, at which time they received from Powell the report of the Citizens Committee.

3. They voted for the condemnation of Progress' properties at the Park Board meeting on December 7, 1959, and thereafter caused the present suit to be filed.

"The meeting of December 3, 1959, can be quickly disposed of—Mitchell's only participation in this meeting was to tell Harold Lewis of the Citizens Committee (in response to a question by Lewis as to the Park Board's plan for a referendum) that 'it was none of his business.' There is no evidence that Walchli even attended this meeting.

"The conspirational act relied on at the meeting of December 6, 1959, at the Powell home was the receipt by these two Park Board Commissioners from Powell of the Citizens Committee report, which is termed by Progress as a 'colorable device' to justify the later condemnation. The Park Board had received other reports from this same Citizens Committee. This report represented approximately a year's work most of which antedated the Progress controversy. The document bears the innocuous title, 'The Growing Village of Deerfield,' contains only general recommendations, and is totally undeserving of any role in an alleged conspiracy.

"The informal meeting of December 7th at the Jursich home took place *after* the Park Board had already adopted resolutions providing for the acquisition of Progress' two properties, and the submission of the referendum to the voters of Deerfield in the amount of $550,000 to provide funds for the purchase or acquisition of a total of six park sites including Floral Park and Pear Tree. At this meeting Mitchell and Walchli admittedly discussed the proposed referendum, and sought the aid of the persons present in supporting the referendum including Lewis, the vocal president of the Residents Association.

"These are the only specific charges made against the members of the Park Board, and it is on this tenuous evidence that Progress bases its claim that the 'sole and exclusive purpose of this condemnation' is to prevent it from carrying on its lawful business." (R. 262-264.)

What is attempted is simply this, Progress Development Corporation, whose property is subject to the right of eminent domain, challenges the *motives* of the Park Board Commissioners in condemning the property. Admittedly the land is needed and will serve a public purpose. Nevertheless, Progress Development Corporation says that by reason of these alleged improper "motives," the right of eminent domain is lost. Also, the fact is disregarded that before Progress Development Corporation had ever been heard of, this very land was chosen as needed Park property.

## Progress Development Corporation's "Controlled Occupancy Pattern".

The attorneys for Progress Development Corporation have carefully avoided any reference to its discriminatory quota system, euphonically entitled, "Controlled Occupancy Pattern." This *quota* system, not sales to negroes, was the focal point of the opposition to Progress Develop-

ment Corporation in Deerfield. Under the quota system, only a limited number of homes could be sold to negroes, and a limited number could be sold to white persons. This race discrimination was leveled at both negroes and whites. (R. 106, 176, 179, 274-276.)

This plan of operation was fully reviewed in *Progress Development Corporation* v. *Mitchell*, 286 F. 2d 222 at 230, where the Court stated:

> "Deerfield at present has no Negroes living within its village limits, although some had formerly lived there. Progress, in an attempt to get Negro purchasers into the local housing market, announced its plan to sell 10 to 12 of its 51 houses to Negroes. This percentage was determined by surveying the normal population ratio in the Chicago area which was approximately 78 to 80 per cent white and approximately 22 to 20 per cent non-Caucasian.
>
> "The nature of plaintiffs' efforts to control such percentages in the future was highly controverted before the district court. The court ordered production of purported resale agreements which would give plaintiffs a first option to repurchase the homes of their vendees. Plaintiffs point to the fact that at present no homes have been sold with such agreements and that the resale agreement is only tentative and has not been formally adopted by Progress' Board of Directors. However, the trial court found as a fact that:
>
> " 'On the trial, plaintiffs were unconvincing in their attempts to avoid the stigma of forcing purchasers to execute such agreements by stating that execution of such agreements would be urged but would not be required. It is clear, and I find, from the admissions of plaintiffs' officers and attorney, and from available literature, that plaintiffs intend to control the ratio of Negroes and Caucasians living on the premises in question for ten years and plans to do it by reserving to Progress or its nominee the right to determine the pur-

chaser of the property when an owner desires to resell.'

"On the basis of this finding, the district court held that as a matter of law:

> "'The "controlled occupancy pattern" and resale quota system which Modern Community Developers, Inc., proposes to use in Deerfield through Progress Development Corporation is illegal both as to initial sales and resales. The power of a federal court cannot be used consistently with the Fifth Amendment and the Civil Rights Statutes to impose any percentage quota of Negro or Caucasians. Similarly, State power and authority cannot be constitutionally employed within the restrictions of the Fourteenth Amendment to control either the original or subsequent devolution of realty on a quota basis.'"

This race discrimination planned by Progress Development Corporation followed a pattern previously set by its President, Morris Milgrim.[4]

The other facts established in the Trial Court have been detailed with painstaking care by the learned Trial Judge in his opinion where they are presented without the biased slant of attorneys for Progress Development Corporation. To avoid repetition we call the Court's attention to the Trial Court's opinion at pp. A-1 to A-37 of the Appendix hereto, *infra*.

---

4. In reporting that negroes view these quotas as a form of discrimination, The Wall Street Journal, Vol. XLII, No. 210, for August 13, 1962, stated:

> "Morris Milgrim, developer of Concord Park, an eight-year-old 139-home interracial community at Trevoce, a Philadelphia suburb, says he established a ration of 55% white residents to 45% Negro after his sales office initially was 'deluged with Negroes.' To maintain that ratio, he had buyers agree to let him handle resales for the first three years."

## SUMMARY OF ARGUMENT.

1. The question of fact has been decided by the state court, and this Court should not re-weigh the evidence and try the case *de novo* on the record.

2. No constitutional or federal question is presented.

3. The need and necessity to use the land for park purposes was both established and conceded. The jurisdiction of the courts was exhausted when this proper municipal function was determined.

4. The alleged motives of the legislative body in exercising the right of eminent domain is not the subject of judicial investigation.

5. A private corporation organized for profit, holding property subject to the right of eminent domain, does not acquire a condemnation-free status by announcing that it intends to force integration through a "controlled occupancy" plan, which plan establishes and maintains a quota system, limiting the number of Negro families and White families who may live on the property.

6. This private corporation organized for profit has had equal protection of the law. All other property owners in Deerfield hold their land subject to condemnation for needed municipal purposes, and many have had their land taken for such purposes. The petitioner here seeks a *preference*—not equality.

## REASONS FOR DENYING THE WRIT.

### A. The Decision of the Trial Court Was Based Solely On a Question of Fact.

This case is not reviewable by this Court under the jurisdictional statute alleged, 28 U. S. C. 1257(3), since no constitutional rights are involved.

As heretofore pointed out, the issues in this case were raised by the traverse (motion to dismiss) filed by Progress Development Corporation. The issues raised and tried were two factual issues: (1) was there a *bona fide* public need for acquisition for public use, and (2) was there a conspiracy of the Park Board members to deprive Progress Development Corporation of any civil right. The first issue was conclusively proved, no evidence to controvert it was offered and it was, in fact, conceded.

The second issue, that of conspiracy, likewise raised only a question of fact. *United States* v. *Yellow Cab Co.*, 338 U. S. 338; *Barry* v. *Legler*, [illegible] (2d) 297, 303; *Rohlfing* v. *Cat's Paw Rubber Co.* (U. S. D. C. N. D. Ill. E. D., 1954), 17 F. R. D. 426, 430. The lower court found there was no conspiracy, and in affirming, the Illinois Supreme Court made a similar pronouncement. Having decided the case on the *factual* questions presented by the defendant, the Illinois Supreme Court quite properly stated: "No violation of the fourteenth amendment is here involved."

In this case, the question of *fact* has been determined. This was determined after a full consideration of the voluminous evidence produced at the trial level. Regardless of the purpose of an alleged conspiracy, whether allegedly of union members to infringe upon the rights of individuals by use of violence, whether allegedly of business men to interfere with other business men, whether allegedly of these Park Commissioners to interfere with the rights of

this business concern to do business, the question of the existence of the conspiracy is always a question of *fact*. The question of fact is exclusively for the jury, if there be one, otherwise for the court. (*Barry* v. *Legler*, 39 F. (2d) 297, 303; citing many cases; *United States* v. *Yellow Cab Co.*, 338 U. S. 338.) In this case, this question of fact was conclusively determined.

The position of Progress Development Corporation is quite similar to that of the government in *United States* v. *Yellow Cab Co.*, 338 U. S. 338, where the defendants were charged with a conspiracy and also found not guilty by the lower Court. The conspiracy was the basic issue raised. The case came on direct appeal to this Court, not under discretionary jurisdiction.

The government asked the court to do the same as Progress Development Corporation is asking in this case.

> "What the Government asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own. Specifications of error which are fundamental to its case ask us to reweigh the evidence and review findings that are almost entirely concerned with imponderables, such as the intent of parties to certain 1929 business transactions, whether corporate officers were then acting in personal or official capacities, what was the design and purpose and intent of those who carried out twenty-year-old transactions, and whether they had legitimate business motives or were intending to restrain trade of their competitors in car manufacture, such as General Motors, Ford, Chrysler and Packard." (p. 340.)

In the present case the trial judge supported his judgment with a detailed opinion prepared with obvious care after opening the evidence door "to its widest point" for Progress. Similarly in the *Yellow Cab* case:

> "The judgment below is supported by an opinion,

> prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others." (pp. 340-341.)

In the *Yellow Cab* case this Court made the following observations which are particularly appropriate:

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends." (p. 341.)

The facts in this case have now been carefully reviewed by 12 judges. The United States District Court (*Progress Development Corporation* v. *Mitchell*, 182 F. Supp. 681) and the Circuit Court of Appeals (*Progress Development Corporation* v. *Mitchell*, 286 F. (2d) 222), considered this same evidence and found it insufficient to sustain Progress' charges of conspiracy. In the District Court Judge Perry, an experienced trial judge, said at page 700:

> "The plaintiffs were given wide latitude in the production of all proofs possible. All sources of possible conspiracy were minutely examined into by plaintiff's counsel. No conspiracy, or any semblance of conspiracy by the Park Board Commissioners was proved, . . . ."

Chief Judge Hastings in the Circuit Court of Appeals, speaking for a panel of Judges, said at page 229 in affirming the order of the District Court in denying a preliminary injunction to Progress:

> "We have carefully studied the entire voluminous record of the evidence adduced at the lengthy hearings and conclude that on the basis of the testimony and documents before it, the court was fully justified in denying temporary equitable relief under both Counts I and II. The trial court's findings are not only supported by substantial evidence, but our examination of the record fails to reveal to us any evidence of conspiracy."

The trial judge, Bernard M. Decker,[5] after granting Progress Development Corporation a full hearing with the "evidence door opened to its widest point" and admitting all evidence "bearing even a tinge of materiality" (R. 249, 250, 252) found "the evidence wholly fails to establish the charge of conspiracy against the members of the Park Board." (R. 281-282.)

On the appeal to the Illinois Supreme Court the seven justices unanimously affirmed Judge Decker's order, stating:

> "* * * there is no evidence that any member of the Park Board formed or engaged in any conspiracy to deprive Progress of any of its legal rights."

It is to be noted that every one of the 12 judges who heard or reviewed all evidence in the case, did not just hold that that the alleged conspiracy had not been proved, but held that there was *no* evidence of conspiracy.

This case was decided solely on a non-federal question. This Court has no jurisdiction to issue the writ herein prayed.

---

5. Judge Decker, with years of experience on the trial bench, has since been appointed to the United States District Court.

**B. Under the Separation of Powers, the Power of the Judicial Branch to Proceed in This Case Has Been Exhausted.**

The public need and use for the land involved herein has been conclusively proved and in fact *conceded* by the property owner. Once this step has been reached, the authority of the judiciary to proceed with the case ceases.

**1. The Power to Take Property for Public Use by Eminent Domain Is Essential to the Life of the State.**

"The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the state. It cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will. (Citing cases.)" *Georgia* v. *City of Chattanooga* (1924), 264 U. S. 472, 480.

"The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. Vatt. ch. 20, 34; Bynk. lib. 2, ch. 15; Kent, Com. 338-340; Cooley, Const. Lim. 584, 35 *seq.*" *Kohl* v. *United States* (1876), 91 U. S. 367, 371-372.

**2. The Right of Eminent Domain Is Superior to Property Rights.**

"It is superior to property rights (*Kohl* v. *United States*, 91 U. S. 367, 371, 23 L. ed. 449, 451); and extends to all property within the jurisdiction of the state * * *." *Georgia* v. *City of Chattanooga* (1924), 264 U. S. 472, 480.

"No one doubts the existence in the state governments of the right of eminent domain—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held." *Kohl* v. *United States* (1876), 91 U. S. 367, 371.

"All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities, or the exigencies of the occasion, demand." *United States* v. *Lynah*, 188 U. S. 445, 465.

**3. Necessity, Expediency and Extent of Taking Is a Legislative Question.**

"That the necessity and expediency of taking property for public use is a legislative, and not a judicial, question, is not open to discussion. (Citing cases)" *Joslin Mfg. Co.* v. *City of Providence*, (1923), 262 U. S. 668, 678.

"The question is purely political, does not require a hearing, and is not the subject of judicial inquiry." *Joslin Mfg. Co.* v. *City of Providence*, (1923), 262 U. S. 668, 678.

"The necessity for appropriating private property for public use is not a judicial question." *Rindge Co.* v. *Los Angeles County* (1923), 262 U. S. 700, 709.

**4. The Legislature May Delegate the Authority to a Municipality, and the Determination of the Municipal Governing Body Is Conclusive.**

"Neither is it any longer open to question in this court that the legislature may confer upon a municipality the authority to determine such necessity for itself. (Citing cases)" *Joslin Mfg. Co.* v. *City of Providence*, (1923), 262 U. S. 668, 678.

"The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature, and may either be exercised by the legislature or delegated by it to public officers. 'Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate.

> They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the 14th Amendment.' *Bragg* v. *Weaver*, 251 U. S. 57, 58, 64 L. ed. 135, 136, 40 Sup. Ct. Rep. 62." *Rindge Co.* v. *Los Angeles County*, (1923), 262 U. S. 700, 709.

**5. The Taking of Land for a Park Is a Public Use.**

> "Thus, the condemnation of lands for public parks is now universally recognized as a taking for public use. *Shoemaker* v. *United States*, 147 U. S. 282, 297, 37 L. ed. 170, 184, 13 Sup. Ct. Rep. 361." *Rindge Co.* v. *Los Angeles County*, (1923), 262 U. S. 700, 707-8.

When a proper municipal function—need and necessity to use the land for park purposes—had been established, the jurisdiction of the courts was exhausted.

## C. The State Courts Decided This Case in Accordance With Applicable Decisions of This Court.

### 1. The Motives of the Body Exercising Legislative Discretion Cannot be Inquired Into by the Judiciary.

Progress Development Corporation was faced with the well established and well considered law that courts cannot inquire into motives of legislators. In an attempt to circumvent the law, it first alleged a conspiracy. The Illinois Supreme Court recognized this for what it was—an attempted inquiry into *motives*. Allegations of conspiracy were similarly made in the landmark case of *Fletcher* v. *Peck*, 6 Cranch 87, 129:

> "The second count assigns, in substance, as a breach of this covenant, that the original grantees from the state of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to, and vote for, the passing of the act, and if the said bill should pass, such members should have a share of, and be interested

> in, all the lands purchased from the said state by virtue of such law. And that divers of the said members, to whom the said promises were made, were unduly influenced thereby, and, under such influence, did vote for the passing of the said bill; by reason whereof the said law was a nullity, etc., and so the title of the state of Georgia did not pass to the said Peck, etc."

On a demurrer to this plea the Court, speaking through Chief Justice Marshall, recognizing the attack was on *motives* stated at 130:

> "It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice."

Another approach used to avoid the *motive* rule, was the substitution of "racial considerations" or "racially motivated" for the word "motives." This exercise in semantics cannot avoid the application of established law to the facts in this case.

The issues in the cases of *Detroit United Railway* v. *City of Detroit*, 255 U. S. 171, and *Soon Hing* v. *Crowley*, 113 U. S. 703 raised factual issues parallel to this case. In the *Detroit United Railway* case, the Council of the City of Detroit adopted an ordinance to have the voters approve a bond issue to secure funds to acquire the property owned by the Railway Company for a city transportation system. This Court commented as follows:

> "The bill abounds in *allegations that voters were misled* by the fraudulent conduct of the officials of the city in their efforts to procure the property of the complainant at less than its value by misrepresenting in a circular and otherwise, the purpose and effect of the vote to be taken upon the question of acquiring a municipal system of transportation. We think that

> *the court below correctly* held that the *motives of the officials, and of the electors* acting upon the proposal, *are not proper subjects of* judicial inquiry in an action like this so long as the means adopted for submission of the question to the people conformed to the requirement of the law. The principle has been declared by this court." (Emphasis supplied.) (255 U. S. 171, 178. )

In *Soon Hing* v. *Crowley* (1885), 113 U. S. 703, where an attack was made against a local ordinance adopted by the Supervisors of the City of San Francisco regulating hours for employment in hand laundries, the plaintiff claimed:

> "* * * that it was adopted owing to a feeling of antipathy and hatred prevailing in the City and County of San Francisco against the subjects of the Emperor of China resident therein, and for the purpose of compelling those engaged in the laundry business to abandon their lawful vocation, and residence, there, and not for any sanitary, police or other legitimate purpose." (P. 710.)

This Court disposed of the claim as follows:

> "The motives of the legislators, considered as the purposes they had in view, will always be presumed to be, to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. *The diverse character of such motives,* and the *impossibility of penetrating into the hearts of men* and ascertaining the truth, *precludes all such inquiries* as impracticable and futile. And in the present case, *even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed* from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretense." (Emphasis supplied.) (P. 710-711.)

The validity of ordinances or laws, or other actions by legislative bodies, is tested by *objective standards* applied by the judiciary. There is certainty in the law that if these standards are met, the legislative action is valid. Were it otherwise, and the *motive* of the legislative body be subject to judicial inquiry, there would be no certainty in any legislation. Identical legislative actions taken by two different legislative bodies could be valid in one instance and invalid in the other, because of different "motives" of the legislators in enacting the legislation.

If validity of municipal legislation is to depend upon "motives" of the legislators, instead of municipal purpose, most municipal ordinances and zoning regulations will end up in the courts and Pandora's Box will be opened. The race to the courts had already started in Illinois.[6]

In *Fletcher* v. *Peck*, 6 Cranch 87, 130, Chief Justice Marshall recognized the limitations on the judiciary:

> "If the principle be conceded, that an act of the supreme sovereign power might be declared null by the court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation; or would its obligation or nullity depend upon the public sentiment?
>
> If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province

6. See The University of Illinois Chicago campus case—*The City of Chicago* v. *R. Zurick Co.*, Docket Nos. 37652 and 37653 (decided by the Illinois Supreme Court on February 28, 1963) where "defendants seek to question the motives of the authorities in designating the areas as slums." In ruling "the motives that prompt the taking are not the subject of judicial investigation", the Illinois Supreme Court cited the instant case.

> of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned."

Despite these restrictions on the judiciary, the trial judge allowed Progress Development Corporation to produce all evidence it desired to introduce. He found that the members of the Park Board had no motives to discriminate against Progress Development Corporation. (R. 278-279.)

The cases cited by attorneys for Progress Development Corporation do not present any contrary rule or any modification of the "motive" rule. In each case either the legislation was discriminatory on its face or there was discrimination in enforcement. *Gomillion* v. *Lightfoot*, 364 U. S. 339, is illustrative. In that case the illegal purpose was clear from the face of the act. The municipal officials, charged with racial discrimination, "never suggested, either in their brief or in oral argument, any countervailing municipal function which Act 140 is designed to serve." (p. 342.) By contrast, in the instant case, the legislative act authorizing the condemnation is not discriminatory on its face and the opponents have *conceded* that the acquisition does and will serve a needed municipal function.

**2. Public Use and Necessity Are Not Affected by the Landowner's Proposed Use of the Property.**

Progress Development Corporation says that since it announced its "controlled occupancy" plan to sell some houses to negroes, its proposed use of the land became superior to the municipal need. The trial judge put his finger on it when he stated:

> "Stripped to its essentials the contention of Progress is that the residents of Deerfield had no legal right

> to make a choice between the use of Progress' land for park purposes for the benefit of the general public of Deerfield in preference to its use by the defendant for a private residential development." (R. 277.)

Condemnation does not present a contest between the public use and the landowner's proposed use. The sole issue is the public need and use. The landowner's use is irrelevant. This is true even when that landowner announces that it intends to force integration through a "controlled occupancy pattern" which establishes and maintains a quota system, limiting the number of Negro families and the number of white families who may live on the property.

The right of eminent domain cannot be controlled or defeated by want of consent of private parties.

> "* * * the absolute necessity that the means in the Government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by want of consent of private parties or of any other authority'." *Kohl* v. *United States* (1876), 91 U. S. 367, 373.
>
> "If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a State prohibiting a sale to the Federal Government, the constitutional grants of power may be rendered nugatory, and the Government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be." *Kohl* v. *United States* (1876), 91 U. S. 367, 371.

### 3. The Landowner Is Not Seeking Equal Protection—It Is Seeking a Preferred Status.

Equal protection would afford Progress Development Corporation the same rights and limitations as any other land owner in Deerfield Park District—nothing more and nothing less. This corporation argues, however, that of

of the landowners in the Park District, its land alone is exempt from condemnation to fill a conceded public need.

In determining whether Progress Development Corporation stands on a "condemnation-free plateau," relieved of the restrictions of every other private owner who holds his title subject to condemnation, we suggest a careful examination of this corporation.

Chief Justice Hastings made such examination. His opinion, which had the unanimous approval of the United States Court of Appeals, stated:

> "Since all parties have attempted to inject a racial issue into these proceedings, it seems appropriate to comment on the real issue involved in this litigation. The Plaintiffs are two corporations organized for profit utilizing only private capital in their operations. No federal agency and no federal funds are involved. For reasons best known to themselves plaintiffs have widely advertised and proclaimed a sales policy based upon a controlled occupancy plan with a quota system they have deemed best suited for the social progress of Deerfield. Some of the citizens of the Village of Deerfield have openly voiced their objections to such a plan and in doing so have exercised their constitutional right of freedom of expression and peaceable assembly. Other citizens of that community have exercised a similar right to express an opposite viewpoint. Plaintiffs have alleged that the conduct of the former group, acting in concert with lawfully constituted Village officials, amounts to an unlawful conspiracy designed to cause such officials to subvert their lawful powers of condemnation and enforcement of local building ordinances to the end that plaintiffs are deprived of their lawful right to engage in business and make a profit. * * * This case is that and nothing more.
>
> "In this case no *individual* claims to have been denied a personal right. No one claims he has been denied the right to purchase a home. No one claims he has been denied the right to vote, to go to school,

> to live in a certain place, to eat in a public place, to seek transportation without interference or to work or worship as he chooses. We are concerned with the corporate right to engage in business and make a profit." (Emphasis by Court.) *Progress Development Corporation* v. *Mitchell*, 286 F. 2d 222, 234.

With reference to the "corporate right to engage in business and make a profit," the Progress Development Company *method* of operation raised controversies in the community. We have set forth this plan of operation in our Statement. (*Supra*, pp. 10-12.)

This clear-cut picture of Progress Development Corporation does not place it on a "condemnation-free plateau." It is a corporation organized for profit. The fact that it announced an *intention* to place into operation a "controlled occupancy" plan, whereby *it* would determine the ten to twelve Negroes, and *no more*, who would move into the development did not elevate it to that privileged plane. Nor did the fact that it would sell to only 39 to 41 *white* persons, provide this elevation.

We respectfully suggest that the announcement by this corporation, organized for private profit, that it intends to enter into this program in the *future*, does not abrogate the fundamental law that every private owner of property holds his title subject to the sovereign power of eminent domain. Nor does the fact that the announced *future* plans include a sales policy based upon a *controlled occupancy* plan with a *quota of Negroes*, which the organizers of this corporation deem best suited for the social progress of Deerfield, alter the law. Likewise, community disagreement with this discriminatory method of operation does not give this corporation special rights not given to others. Progress Development Corporation's property, as any other property, is subject to the right of eminent domain.

Quota systems have been reviewed by the courts and have been consistently disapproved as discriminatory.

In *Hughes* v. *Superior Court*, 339 U. S. 460, a grocery store was picketed because it failed to hire Negro clerks in accordance with a "quota system" (p. 463) based upon the proportion of Negro customers. Disregarding an injunction to cease picketing, the petitioners were found guilty of contempt. Mr. Justice Frankfurter in affirming the contempt convictions quoted with approval (pp. 463-64) the California State Supreme Court when, in affirming the convictions, it said:

> "It was just such a situation—an arbitrary discrimination upon the basis of race and color alone, rather than a choice based solely upon individual qualification for the work to be done—which we condemned * * *. The fact that those seeking such discrimination do not demand that it be practiced as to all employees of a particular employer diminishes in no respect the unlawfulness of their purpose; they would, to the extent of the fixed proportion, make the right to work * * * dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race. If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis. Yet that is precisely the type of discrimination to which petitioners avowedly object."

*Henderson* v. *United States*, 339 U. S. 816, presented a similar question in railroad dining cars. A railway company apportioned facilities in the ratio that the number of white and Negro passengers, who ordinarily applied for service, bore to each other. Neither race could sit at tables reserved for the other. The District Court sustained the rule (p. 822) as "proportionately fair." This Court reversed, observing:

> "The right to be free from unreasonable discrimina-

tion belongs, * * *, to each particular person * * *. Under the rules, only four Negro passengers may be served at one time and then only at the table reserved for Negroes. Other Negroes who present themselves are compelled to await a vacancy at that table, although there may be many vacancies elsewhere in the diner * * *. The rules imposed a like deprivation upon white passengers whenever more than 40 of them seek to be served at the same time and the table reserved for Negroes is vacant. (pp. 824-825.)

* * * * *

"That the regulations may impose on white passengers in proportion to their numbers, disadvantages similar to those imposed on Negro passengers is not an answer * * *. Discriminations that operate to the disadvantage of two groups are not the less to be condemned because their impact is broader than if only one were affected." (pp. 825-826.)

A quota system in rental housing was condemned in *Taylor* v. *Leonard*, 103 A. 2d 632 (N. J., 1954). There a public housing authority admittedly refused to rent a larger percentage of units to Negroes than their number bore to the total population of the city. The New Jersey court quicky found such a scheme invalid under both the State and Federal Constitution, saying (p. 633):

"The use of any quota system in admitting Negroes to public housing projects is discriminatory. * * *

"It is immaterial that the quota actually used bears some relation to the percentage of Negro population in the particular municipality.

"The evil of a quota system is that it assumes that Negroes are different from other citizens and should be treated differently. Stated another way, the alleged purpose of a quota system is to prevent Negroes from getting more than their share of the available housing units. However, this takes for granted that Negroes are only entitled to the enjoyment of civil rights on a quota basis."

The exact pattern this Court has held illegal was followed in this case with a quota system the organizers of Progress "deemed best suited for the social progress of Deerfield." This illegal pattern gave Progress no rights superior to others.

Progress Development Corporation's entire argument is that it was denied equal protection of the laws. This presents the question of wherein the inequality lies. Many people in Deerfield have had their land taken for municipal purposes for schools, parks, village hall, village garage, sewerage disposal plant, fire station, library, township hall, parking areas and other municipal uses. Each of the people owning the land before it was acquired for municipal use, held title subject to the superior right of the municipality to take the land for municipal use, *regardless of the use the landowner was making of it or proposed to make of it.* Each landowner was paid the value of the land and could purchase other land or use the money for any purpose he desired.

Progress Development Corporation is being accorded *equal* treatment. It is a corporation attempting to make money by subdividing land and selling it for a profit. It *concedes* that the land being acquired is needed for a necessary municipal purpose and will be used for public municipal purposes. But it says it should be treated differently than any other property owner in Deerfield, that it has not only *equal* rights, but rights *superior* to any other landowner in Deerfield. Its position is that the conceded necessity of the land for public municipal use becomes subservient to the use this business concern plans to make of the land. The power of the state to carry out its governmental functions becomes secondary to the desire of this money making business concern. This corporation, as equally as any other property owner in Deerfield, can take

the $166,199.91 which it has agreed is the fair value of the land being taken for an admitted municipal purpose and purchase other land in Deerfield or anywhere else it pleases to develop for whatever profit it can make. All other property owners are treated in *exactly* the same way.

This business corporation has been accorded protection absolutely equal to that accorded all other property owners in Deerfield. It is seeking a *preference*—not equality.

## CONCLUSION.

There is no constitutional question involved. This private corporation, organized for profit, attempted to secure a condemnation-free status through the device of alleging Park Board Commissioners engaged in an unlawful conspiracy against it. The fact question raised under that charge was decided adversely to this corporation, with no dissent, by 12 judges.

The Petition for Writ of Certiorari seeks a review of the facts by an exaggerated and prejudiced statement of activities in the community resulting from the "controlled occupancy" plan announced. The opposition engendered to this discriminatory practice, which violated the constitutional rights of both Negro and White persons, is used as the basis for charging that the Supreme Court of Illinois failed to afford equal protection to "Negro Americans".

As the trial judge stated:

> "Progress has already agreed to accept the sum of $166,199.91 as fair compensation for its two properties. It has had its full hearing upon the issues raised by its motion to dismiss. The evidence establishes without question that the taking of this property is necessary and for a public purpose. The evidence wholly fails to establish the charge of conspiracy against the members of the Park Board. In this situation Progress, as any other citizen, must yield to the paramount right of the Park District to take private land for public use.

"Nothing in this decision will affect or impair in any way the admitted right of Progress to carry on its business at any other location where it may be authorized to build homes and at its election to sell a selected number of these homes to members of the Negro race." (R. 281-282.)

Like the other four property owners, whose land was acquired from the funds raised in the December, 1959 election, Progress Development Corporation has had equal treatment. It can use the condemnation award to continue in its attempt to profit from trafficking in the volatile field of race relations.

The Petition for Writ of Certiorari is without merit and should be denied.

Respectfully submitted,

GERALD C. SNYDER,
301 Washington Street,
Waukegan, Illinois,

ALLYN J. FRANKE,
100 West Monroe Street,
Chicago 3, Illinois,
*Attorneys for Respondent.*

# APPENDIX.

DEERFIELD PARK DISTRICT vs. PROGRESS DEVELOPMENT CORPORATION, ET AL.

## Memorandum of Opinion of Trial Court October 18, 1961.

R. 246

MEMORANDUM OF OPINION.

This is a condemnation suit brought by the Deerfield Park District against the Progress Development Corporation. Progress is in the busines of acquiring residential subdivisions and constructing and selling home sites thereon.

The land involved consists of two separate parcels owned by Progress, one known as Floral Park and the other as Pear Tree. Floral Park is a fifteen acre tract which the Park District seeks to condemn for general recreational purposes, and Pear Tree is a six and a half acre tract which the Park District plans to convert into the only

R. 247

swimming pool in the Village of Deerfield.

Progress acquired these two parcels and subdivided them in July and August of 1959, for the purpose of erecting thirty-nine homes in Floral Park and twelve homes in Pear Tree.

By the middle of November, 1959, Progress had commenced the construction of two homes in Floral Park. While this construction was still in progress the news reached the public in Deerfield that Progress intended to sell some of its homes in Floral Park to Negroes.

Thereafter on December 7, 1959, the Park Board took formal action to designate Floral Park and Pear Tree as park sites, and ordered that they be acquired by condemnation proceedings for park purposes. Progress rejected the offer of the Park Board to purchase these two subdivisions for $166,199.91. At the same time the Park Board by proper resolution provided for a referendum to be held on December 21, 1959, and submitted to the voters of the district a $550,000.00 bond issue, $175,000.00 of which was designated for the purchase of the two subdivisions owned by Progress, wtih the remainder of the bond issue to cover the acquisition of four other park sites of approximately fifty eight acres, making a total of approximately eighty acres in six tracts.

On December 21, 1959, the bond issue referendum was held and was approved by approximately a two to one vote.

This condemnation proceeding was filed on December 24, 1959, and is concerned only with the two subdivisions in question. On December 22, 1959, Progress filed a com-



plaint in the United States District Court for the Northern District of Illinois against the Park District, the Village of Deerfield and members of their respective boards, together with other individuals, alleging a conspiracy to deprive Progress of its civil rights and seeking to enjoin the Park District from condemning its land. After

a series of hearings the District Court denied injunctive relief and dismissed the complaint.

Thereafter on March 11, 1960, Progress filed a motion in the present case to dismiss the condemnation proceedings on five grounds:

1. That a prior action is pending between the petitioner and one of the defendants in the United States District Court involving the same subject matter.

2. That the filing of the condemnation petition is an overt act in a conspiracy to deprive Progress of its civil rights.

3. That there is no *bona fide* public need for acquisition of this property for public use.

4. That petitioner did not negotiate or bargain in good faith.

5. That the acts of the petitioner in conspiracy with others are abuses of the power of eminent domain.

This court struck grounds 1, 2 and 5 and ordered a hearing on grounds 3 and 4.

Upon this hearing the Park District introduced evidence of its resolution designating this land as necessary for park sites and authorizing its acquisition. They further proved the offers to purchase and their refusal. Progress then submitted a fifty paragraph request for admission of



facts which was treated as an offer of proof. Objections were sustained to this offer and Progress offered no further proof. The parties stipulated to the fair market value of the premises, and an order of condemnation was entered.

Progress then appealed to the Supreme Court of Illinois from this order charging that it had been restricted in making proof of its charges that the present condemnation proceeding is a part of a conspiracy to deprive Progress of its civil rights. The Supreme Court determined that although Progress' offer of proof was "replete with unsupported conclusions and voluminous allegations of fact which appear to be completely immaterial to any issue in the case," nevertheless the remaining allegations were sufficient to charge the Park District with using the power of eminent domain for "the sole and exclusive purpose" of preventing the sale of homes by Progress to Negroes in violation of Progress' right to equal protection of the law. The order of remandment is couched in this language: "This cause is remanded to the Circuit Court of Lake County for the sole purpose of permitting Progress a full hearing on the question of whether this taking is necessary and for a public purpose." (*Deerfield Park District* v. *Development Corporation*, 22 Ill. (2) 132, 141.)

The full hearing sought by Progress has now been held upon all the issues raised by its motion to dismiss. Progress again offered much of the same evidence contained in its original offer of proof upon the first trial. The Park District objected to a large portion of this evidence on the ground that it was immaterial under the terms of the



mandate of the Supreme Court. Notwithstanding this objection all evidence offered by Progress, bearing even a tinge of materiality, has now been admitted.

In its opinion the Supreme Court said (p. 139): "The material questions of fact are whether or not Deerfield

needed park sites; whether or not Progress' property is suitable for park sites, and whether or not these sites will be devoted to public use." The petitioner, Park District, limited its evidence to these issues. A summary of this evidence follows:

Petitioner placed on the stand Roy Layman, a landscape architect and city and park planner whose qualifications were admitted by both parties. Layman had worked for the Park District for about three years prior to the present proceeding. In the spring of 1959, prior to the acquisition of any property in Deerfield by Progress, Layman made a survey of the entire park district to determine what land was suitable and available for park purposes. During the course of this survey the witness inspected and walked upon all of the land that was available in the district, including the two properties involved in this proceeding, Floral Park and Pear Tree. Floral Park was visited twice and on one of these occasions Edward Walchli, one of the members of the Park District, walked over the ground accompanied by Layman. After these visits Layman prepared a map of the Park District which is approximately conterminous with the boundaries of the Village of Deerfield. This map was used by the witness when he appeared before the Park Board on May 19, 1959. Floral Park was shown on this map and was colored in yellow, along with

R. 251

a number of other locations to be considered by the Board as possible park sites. The witness stated that at this meeting he made a recommendation to the Park Board that it acquire the Floral Park site for park purposes, and that it also acquire the Pear Tree site as a secondary site for

a swimming pool. At this same meeting a recommendation was made to the Park Board that an existing park "Jewett Park," be used as a site for a number one swimming pool.

In August 1959 a referendum was held at which the voters were asked to approve a bond issue for the purpose of building a swimming pool in Jewett Park. This bond issue was defeated. After this occurred, and after the present suit was filed, the witness recommended Pear Tree as the primary swimming pool site.

Layman further testified that on December 24, 1959, (the date of the filing of this condemnation proceeding) the Deerfield Park District needed two-hundred and fifty acres of land for park purposes and had a usable park acreage of only forty-seven acres or less than twenty per cent of the land needed to properly carry out its functions. The witness gave his opinion that both Floral Park and Pear Tree were suitably located and proper and necessary sites for public park purposes on the date of the filing of the petition.

James C. Mitchell, the president of the Park District, testified to the definite need for the acquisition of additional land for park purposes, and gave his opinion as to the suitability of these two sites for such use. He testified that Floral Park will be developed and used as a play-ground area with provisions for football, baseball



and the general normal functions of a park. The witness further stated that Pear Tree would be used as a swimming pool for use by the general public, there being no other public swimming pool within the Village of Deerfield.

It was stipulated that each of the other park commis-

sioners would give the same testimony as that given by the Board president.

When petitioner closed its case it was then incumbent upon the defendant Progress in the words of the Supreme Court opinion (p. 141) "to prove by material facts that the exercise of eminent domain in the instant case was not necessary, and was not to be devoted to a public use, but was for the sole purpose of depriving Progress of the right to do business."

Progress produced a number of witnesses who were allowed to testify as to facts within their knowledge relating to an alleged conspiracy, which Progress claimed was entered into by the members of the Park Board and others for the purpose of preventing it from developing its two properties and selling some of its homes to Negroes. When witnesses who had testified in the conspiracy case in the United States District Court were shown to be not available it was stipulated that these witnesses would give the same evidence if tendered in this proceeding.

With the evidence door thus opened to its widest point Progress was permitted to show the following facts:

The public and members of the Park District first learned in the middle of November 1959 that Progress intended to sell some of its homes in Floral Park and Pear

R. 253

Tree to Negroes. Both the members of the Park District and the School District 110 (the district within which the two properties are located) were aware of the plans of Progress to develop these two subdivisions, and the school District had approved an arrangement under which the builder was to contribute to the district $350.00 for every

home built. The building plans for the two houses which were in the progress of construction had already been approved by the Village Board of Trustees.

Prior to November 1959 no reference appears in the official minutes of either the Park District or the School District specifically mentioning either of the two sites in question for any purposes except the arrangement for financial contribution hereinabove referred to. However, there is an oblique reference to Pear Tree in the minutes of the Park Board meeting of May 19th which deals with the report given to the district by the park planner, Mr. Layman. In this report Layman first recommends the location of a new swimming pool at some location east of the tracks and then says, "If the population does reach 26,000 or more, it might be practical to build another smaller pool in the vicinity of or west of Wilmot Road," (this being the general location of the Pear Tree site.)

Progress introduced the testimony of three members of the Park Board who each testified that the Board had considered the Floral Park and Pear Tree sites prior to their acquisition by Progress.

Board member Walchli testified that prior to the May 1959 meeting he was told by the Board to accompany the park planner, Roy Layman, to inspect possible park



sites throughout Deerfield. One of the sites that they visited and walked upon was Floral Park. On this same occasion they drove to Pear Tree and inspected it from the road.

Board member Dewey testified that the Board first discussed acquiring the Floral Park and Pear Tree properties for park purposes in May of 1959, although at this time these parcels were not considered for purchase. Practically the same testimony was given by Aksal Petersen, another member of the Park Board.

Progress labels the foregoing as background evidence.

The following evidence was produced by it to show the alleged conspiracy:

On the night of November 11, 1959, two Deerfield residents appeared at the Village Board meeting and reported to its president, Joseph Koss, a rumor that Progress intended to sell some of its homes in Floral Park and Pear Tree to Negroes. At the conclusion of the meeting this information was given to the other members of the Board.

Subsequently on three different occasions stop orders were issued by the Village Building Commissioner for alleged violations of the building code in the construction of the two homes which Progress had commenced building in Floral Park. No stop orders had been issued prior to this time. (In the Federal District Court proceedings detailed evidence was offered by both parties as to the reason for these stop orders. No such detailed evidence was offered in this proceeding.)

R. 255

On November 17, 1959, the Park Board held a meeting attended by a number of residents of Deerfield, including Joseph Powell, head of a local group known as the Deerfield Citizens Committee. This committee had been in operation for a number of years, its purpose being to examine civic needs in Deerfield and to make recommenda-

fions. On prior occasions the committee had taken positions with reference to the acquisition of park sites. At this meeting Powell advised the Park Commissioners that his committee had been working on its report for the past year, except during the summer months, and that it was almost completed and would be ready for presentation in about two weeks. The Park Board then adjourned its meeting to December 7, 1959.

On November 18, 1959, the Village Board of Trustees met. The plans of Progress were not discussed at the official meeting. After the meeting adjourned the crowd which was on hand remained and a public discussion took place concerning the Progress project. At this time "an unidentified woman" stated that a petition would be circulated to stop the Progress subdivision from becoming a reality.

The Village Board held another crowded meeting on November 23, 1959, attended by members of the press and other news media. This meeting was devoted to an explanation by representatives of Progress as to the type of home it proposed to construct in Floral Park, and its plans to sell a number of these homes to Negroes. During a recess of this meeting one Harold Lewis (one of the defendants in the conspiracy action in the Federal Court) stated

R. 256

that while the Supreme Court had settled the legality of integration he was opposed to the methods employed by Progress, and that opposition to such project "should be confined to such legal possibilities as might exist."

After the Board meeting adjourned on November 23, 1959, a public meeting was held in the American Legion

Hall across the street. A newspaper reporter, Dorothy Arns, testified that at this meeting one Carl Bagge, an attorney, stated that a group of attorneys would assist Mr. Lewis in doing something about the integrated subdivision. In this same speech Bagge is alleged to have reminded the group that the previous bond referendum for park purposes had been defeated, but that opinion in Deerfield had changed and that it might be possible now to get a referendum passed. It was at this meeting that some of the people present suggested that an organization be created with Mr. Lewis as chairman. Thereafter the North Shore Residents Association, an informal organization, was formed.

On November 24, 1959, another public meeting was held at the Deerfield Grammar School at which both Mr. Koss, the Village President, and Mr. Lewis, the President of the newly formed North Shore Residents Association, spoke on the subject of the Progress subdivision.

Within a few days thereafter a number of members of the newly formed North Shore Residents Association met at the home of John Jursich. At this time plans were made to raise funds for the association, and to place a full page ad in the Deerfield Review to be run on December 3, 1959. This ad, after referring to the Floral Park sub-



division as a racially integrated housing project went on to say, "a legal committee is conducting an extensive study of law on the matter, and effective plans have been devised."

The ad concludes as follows: "The vast majority of the people of Deerfield are certain that they are morally

right in resisting this thing, and they are convinced a small group of outside developers, no matter how lofty their claimed objective, cannot master legal technicalities to compel 16,000 Deerfield residents to submit to their dictates." No member of the Park Board was present at this meeting at the Jursich home.

A second meeting took place at the Jursich home on December 3, 1959, which was attended by James Mitchell, the president of the Park Board, along with Harold Lewis and several other members of the North Shore Residents Association. Lewis testified that he had received a telephone call to the effect that Mitchell and the Park Board were planning some kind of a bond issue referendum, and if this were the case he, Lewis, thought it would be a bad idea "for both of us to be out trying to raise funds." Lewis further testified that he asked Mitchell at this meeting whether he could tell him anything about the bond issue referendum, and that Mitchell thereupon told him "It was none of my business," and that they talked about a few general things and Mitchell then left. While Mitchell was present at the meeting the subject of integration was not discussed.

On December 5th and 6th, 1959, the North Shore Residents Association took a poll of Deerfield residents to



determine how many favored and how many opposed the proposed integrated housing development at Floral Park, and the result of the poll was 3500 opposed, 400 in favor and some 50 expressed no opinion.

On the evening of December 6, 1959, James Mitchell and Edward Walchli of the Park Board went to Joseph

Powell's home and at this time received from Powell the report of the Citizen's Committee which was to be delivered to the members of the Park Board on the next day. This report was general in nature and referred to an over-all plan of civic improvements within the Village of Deerfield, including the acquisition of further park sites.

On Monday night, December 7, 1959, the Park Board met at its adjourned meeting and adopted formal resolutions for the purpose of condemning Floral Park and Pear Tree, and authorized submitting offers of purchase to Progress. Following this meeting, Mitchell and Walchli of the Park Board went to the home of John Jursich and at that time delivered the offers of purchase to certain members of the Residents Association for the purpose of serving them personally upon Progress in Chicago the next morning. This meeting was also attended by Harold Lewis of the Residents Association.

On the next day, December 8, 1959, when a newspaper reporter questioned Catherine Price, Secretary of the Deerfield Park Board, as to the reasons for continuing the Park Board meeting from November 17th to December 7th, Mrs. Price is alleged to have stated that this was for the purpose of having the answers to the poll that had been



taken by the members of the North Shore Residents Association, and that the Park Board had an understanding if the answers were not back by December 7th the Board would have met and adjourned to a later date after the answers had been received.

On the morning of December 8, 1959, Progress received the two written offers to purchase the Floral Park and

Pear Tree properties which had been authorized at the Park Board meeting the night before.

The entire record in this case has now been summarized. It is on the basis of this record, and this record alone, that a determination must be made of the legal rights of the parties.

Petitioner asserts that the evidence produced by it clearly establishes that the taking of Progress' two properties is necessary and for a public purpose, and that it is therefore entitled to proceed with this condemnation.

Any objective appraisal of the evidence in this case bearing on these particular issues can lead to no other conclusion than that a definite need existed in the Village of Deerfield for more park areas at the time this suit was filed, and that these two parcels of land owned by Progress, and now known as Floral Park and Pear Tree were and are suitable for such park use. Although no definite plans had been made by the Park Board to purchase either parcel prior to the institution of this suit, it is uncontradicted that the park planner employed by the Park Board had recommended the future acquisition of both parcels to the Park Board as early as May 1959 before any of Progress'

R. 260

plans were known. Progress in its brief filed in this proceeding makes no attempt to deny the need of more parks in Deerfield, and concedes that if a final award of condemnation is entered that the Park Board will in fact devote both sites to public use, one for general park purposes and the other for a swimming pool.

It is Progress' contention that even with this showing of admitted necessity and public purpose that the petitioner

is still not entitled to condemn these two parcels because of an alleged "conspiracy" participated in by members of the Park Board and others to deprive Progress of its right to develop its properties and to sell some of its homes to Negroes. Progress asserts that the evidence shows that this illegal purpose is the "sole and exclusive purpose" of this condemnation and not any claimed need for more parks.

Although "conspiracy" is the only defense raised to the otherwise admitted right of the petitioner to condemn, neither party has discussed the legal principles which must be applied in appraising the evidence bearing upon this issue. Without some legal orientation a charge of conspiracy becomes nothing more than a broad accusation challenging the conduct of a group of persons without specifying any particular illegal act.

By definition a conspiracy is an unlawful combination of two or more persons to do that which is unlawful in itself or to do that which may be lawful but by unlawful means. A common design is the essence of the charge. Although evidence is not required of any express or formal agreement it is still necessary to establish by proof that

R. 261

a conspiracy in fact existed, and that each of the members in some way or manner did, through some contrivance, positively or tacitly come to a mutual understanding for the purpose of accomplishing a common and unlawful plan. Mere knowledge, acquiescence or approval of an act or course of conduct without cooperation or agreement to cooperate is not enough to charge one as a party to a conspiracy, but there must be intentional participation in

the transaction with a view of furthering a common purpose. The proof must be clear and convincing; the evidence to be considered must do more than raise a mere suspicion on which a conjecture or speculation as to the existence of a conspiracy might be based. (*Tribune Co.* v. *Thompson*, 342 Ill. 503, 529, 550; *Bergerson* v. *Mullinix*, 399 Ill. 470, 475; *Marino* v. *United States*, (9th Cir. 1937) 91 Fed. (2d) 691, 694; *United States* v. *Thomas*, 52 Fed. Supp. 571, 580.) Progress' evidence must be viewed in the focus of these basic principles.

After proofs had been closed in this case Progress was asked to prepare a summary of its evidence, listing the names of the alleged conspirators and specifying the particular activities of each in furtherance of the alleged conspiracy.

In its answer Progress names all of the members of the Park Board as conspirators along with certain members of the North Shore Residents Association, certain Trustees of the Village of Deerfield and Joseph Powell of the Deerfield Citizens Committee. The activities listed as to each of these individuals are substantially the same activities as have been already detailed. Progress has a conspiracy



action against all of these defendants still pending in the Federal District Court. The conduct of these other persons becomes relevant here only in determining whether a conspiracy has been shown in which the members of the Park Board themselves participated. Common justice requires that the membership of any person in a claimed conspiracy must first be proved by evidence as to his own conduct and by what he himself said or did—not by what others may have said or done.

Judged by these standards it is immediately apparent that Progress has offered no evidence whatever which directly or indirectly involves three of the members of the Park Board in the claimed conspiracy. As shown by their testimony in the Federal Court proceedings (admitted by stipulation here) commissioners Dewey and Petersen did not attend any of the meetings or participate in any way in any of the activities which Progress now questions. The only evidence as to the other commissioner in this group, Keller, is that he wrote a letter to a Deerfield paper which was published on November 26, 1959, objecting to the manner in which Progress was attempting to "foist" its ideas upon the Deerfield community and again stated these same views at two public meetings which he attended. If the mere expression of common views is enough to constitute one a member of a conspiracy without some further evidence of participation in a common unlawful design then no member of the public would be safe in expressing his opinion on any controversial subject. The Supreme Court of Illinois in its opinion in the appeal taken in this case made this comment on this type of evidence at pages 138 and 139: "We think it of no importance



that the citizens of Deerfield and even a member of the Park District Board were opposed to the policy of controlled occupancy adopted by Progress." (22 Ill. (2d) 132.) Apparently Progress itself did not attach any particular significance to these statements because these activities of Keller were not even mentioned in the summary furnished by it.

Progress had singled out only two members of the Park Board who are particularly charged with furthering the

alleged conspiracy, the Board president Mitchell and the member Walchli. The principal conspirational activities charged against these two are—

1. They participated in private meetings of the Residents Association at the home of John Jursich on December 3rd and 7th, 1959.

2. They participated in a private meeting at Joseph Powell's home on December 6th, 1959, at which time they received from Powell the report of the Citizens Committee.

3. They voted for the condemnation of Progress' properties at the Park Board meeting on December 7, 1959, and thereafter caused the present suit to be filed.

The meeting of December 3, 1959, can be quickly disposed of—Mitchell's only participation in this meeting was to tell Harold Lewis of the Citizens Committee (in response to a question by Lewis as to the Park Board's plan for a referendum) that "it was none of his business." There is no evidence that Walchli even attended this meeting.

R. 264

The conspirational act relied on at the meeting of December 6, 1959, at the Powell home was the receipt by these two Park Board Commissioners from Powell of the Citizens Committee report, which is termed by Progress as a "colorable device" to justify the later condemnation. The Park Board had received other reports from this same Citizens Committee. This report represented approximately a year's work most of which antedated the Progress controversy. The document bears the innocuous title, "The Growing Village of Deerfield," contains only general recommendations, and is totally undeserving of any role in an alleged conspiracy.

The informal meeting of December 7th at the Jursich home took place *after* the Park Board had already adopted resolutions providing for the acquisition of Progress' two properties, and the submission of the referendum to the voters of Deerfield in the amount of $550,000 to provide funds for the purchase or acquisition of a total of six park sites including Floral Park and Pear Tree. At this meeting Mitchell and Walchli admittedly discussed the proposed referendum, and sought the aid of the persons present in supporting the referendum including Lewis, the vocal president of the Residents Association.

These are the only specific charges made against the members of the Park Board, and it is on this tenuous evidence that Progress bases its claim that the "sole and exclusive purpose of this condemnation" is to prevent it from carrying on its lawful business.

Progress itself recognizes the weakness of its position. It concedes that there may have been a need for more parks



in Deerfield at the time this suit was filed. It does not deny that its properties are suitable for park purposes. It admits that if a final award is made that the Park Board will in fact devote these two sites to park purposes for the benefit of the general public. Having made these concessions Progress still denies the right of the petitioner to condemn upon its claim that the condemnation would not have been filed "but for" the news about Negroes, and if this is so, Progress argues, the real purpose of the proceeding must be to discriminate against it and not to provide for more parks. In this contention lies the crux of this controversy.

The first answer to this contention is that Progress is seeking something to which it is not legally entitled—a judicial inquiry into the motives of the members of the Park Board, i.e. their reasons for filing this suit.

The Supreme Court of Illinois in the appeal taken in this case pointed out to Progress that it was not entitled to make such an inquiry when it said at page 140:

> "From an examination of the record in the case at bar, it is apparent that many of the allegations of Progress are framed for the purpose of directing a judicial inquiry into the motives of the individual members of the Park District Board, rather than into the actual purpose for which this land is sought. This is clearly an inappropriate area for judicial inquiry. (*Detroit United Railway* v. *City of Detroit*, 255 U. S. 171, 178, 65 L. ed. 570; *Soon Hing* v. *Crowley*, 113 U. S. 703, 701, 710, 28 L. ed. 1145; *Sinclair Refining Co.* v.

R. 266

> *City of Chicago* (7th Cir.), 178 F. 2d 214, 217.) As we stated in *Ligare* v. *City of Chicago*, 139 Ill. 46, in a condemnation case the purpose for which the power of eminent domain is exercised may be questioned, but 'the motives that may have actuated those in authority are not the subject of judicial investigation.' We cannot see how the rule could be otherwise."

The rule forbidding an inquiry into legislative motives, where a valid legislative purpose is being served, has been followed in other Illinois cases.

In *Wolback* v. *Rubens*, 307 Ill. 186, an attempt was made to challenge the validity of a municipal vacation ordinance on the ground that no public purpose was being served, and that the only motive of the council was to benefit an abutting property owner and thereby serve a private pur-

pose. The trial court accepted this contention and held the ordinance void. In reversing the Supreme Court said at page 190:

> "* * * courts have no right to inquire into the motives of a legislative body nor into the wisdom or expediency of legislative acts. The authority of the courts is limited to an investigation of the question whether the legislative acts are beyond the scope of the legislative power. It is presumed that public officials act honestly and patriotically and discharge their duty to the public. Vacation ordinances are seldom passed without some private individual being benefited, and the ordinances are usually passed at the suggestion of some interested person. Because some private interest may be served by the vacation does not render a vacation ordinance void. Before such an ordinance is void it must clearly appear that no consideration of public interest could have led to its enactment. There is abundant evidence in this record which justified the



> finding of the city council that the public interest is served by vacating this alley, and the court is therefore precluded from making further inquiry with respect to the reasons for its passage."

This holding was reaffirmed in another decision by the Supreme Court of Illinois in *The People* v. *C. B. & Q. R. R. Co.*, 314 Ill. 445, where the court repeated the rule at page 448:

> "This court has repeatedly held that courts have no right to inquire into the motives of a legislative body nor into the wisdom or expediency of legislative acts."

The Supreme Court of the United States considered the same question in *Soon Hing* v. *Crowley*, 113 U. S. 703,

710, 711, 28 L. ed. 1145. In this case an ordinance of the City of San Francisco providing for the closing of all public laundries from 10:00 p. m. to 6:00 a. m. was challenged. The claim was made by the petitioner that the principal objective of the ordinance was to discriminate against the members of the Chinese race, and that it was founded upon the hostile motives of the supervisors who passed it. After justifying the ordinance on the basis that it served a public purpose in protecting laborers from uninterrupted labor and applied to all classes the court said:

> "The motives of the legislators, considered as the purposes they had in view, will always be presumed to be, to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative



> body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as practicable and futile. And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretense."

The only case cited by Progress in support of its contention is *Gomillion* v. *Lightfoot*, 362 U. S. 916, 5 L. ed. 110. Here again the Supreme Court of Illinois has already spoken. The same facts which Progress offered to prove at the first hearing in this case are now in evidence. The language used by our Supreme Court in distinguishing the *Gomillion* case still applies:

"Progress, however, seems to argue that the facts which they have offered to prove would sufficiently rebut the Park District case. In this contention they rely on the recent case of *Gomillion* v. *Lightfoot*, 362 U. S. 916, 5 L. ed. 2d 110. As we have noted before, the teaching of that case is relevant here, but we think the facts are inapposite. The *Gomillion* case involved a suit for declaratory judgment by several Negroes claiming that Local Act 1940 of the Alabama legislature was invalid on the ground that it deprived them of certain constitutional rights. Act 140 redefined the territorial limits of the city of Tuskegee, converting its shape from square to an 'uncouth twenty-eight sided figure.' All but four or five of approximately 400 qualified Negro voters were thereby excluded from the municipality while none of approximately 600 white voters were removed.

R. 269

The United States Supreme Court, in striking down the redistricting said:

'These allegations, if proven, would abundantly establish that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering. If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.

* * * * *

'The complaint amply alleges a claim of racial discrimination. Against this claim the respondents have never suggested, either in their brief or in oral argument, any countervailing municipal function which Act 140 is designed to serve.'

> In the case at bar, the action protested—the condemnation of land for park purposes, is a legitimate and laudable municipal function. The designation of Progress' land as a park site and its acquisition, standing alone, contains no such irresistible mathematical demonstration of illegal purpose as contained in the Alabama legislation.
>
> In *Gomillion*, the United States Supreme Court did not engage in any metaphysical investigation into the motives of the legislators. They found the inescapable illegal purpose from the act itself." (*Deerfield Park Dist.* v. *Progress Development Corp.*, 22 Ill. (2d) 132.)

A case much closer on its facts is *City of Kirkwood* v. *Venable*, 351 Mo. 460, 173 S. W. (2d) 8. Here the City of Kirkwood sought to condemn for park purposes four lots



located within the center of the business district, within 200 feet of the new City Hall. An unoccupied dilapidated house was located on one of the lots and the remaining lots were filled with debris and weeds. The defendant owner contended that the condemnation was not brought in good faith for a public purpose to create the proposed park, but rather to remove this particular property as an eyesore, and that this purpose was not public but private. In refusing to disturb the order of condemnation entered by the trial court the Supreme Court of Missouri said at page 12:

> "While appellant concedes that respondent has the right to condemn for a public purpose and in good faith to acquire lands for a public park, she contends that the proceeding here is a 'mere sham and subterfuge for the purpose of concealing the ulterior motive behind the whole matter.' Appellant says 'the use alleged was public but the proof showed it was private.' The evidence bearing on the issue of good

faith, however, is sufficient to show that the described property was needed for park purposes; that it was suitable for such purposes; and that the respondent city expects and intends to use it for such purposes. Appellant's evidence only tends to show that the motive back of the passage of the ordinance by the city council for the creation of the city park, and the condemnation of appellant's property for that purpose, was to remedy the unsightly, unhealthy and disreputable conditions existing on the said premises. In other words, it appears that the condition of the premises created a demand for a city park on the property and caused the public generally to apply such pressure on the city official to remedy the situation as to force the passage of the ordinance for the creation of a

R. 271

park at the particular location. The evidence is directed to the wisdom, expediency or necessity for the exercise of the right to condemn the property for park purposes. Such evidence is wholly insufficient to establish that the property is being condemned for a private rather than a public purpose."

After the *Kirkwood* case the St. Louis Court of Appeals in *State* v. *Weinstein*, 329 S. W. (2d) 399, was presented with almost the same problem which faced this court in the first hearing of this case. The parallel between the two cases is readily apparent.

The City of Creve Coeur filed its petition for the purpose of condemning certain land for park and playground purposes which included two lots owned by Howard P. Venable and Katie Venable. The Venables had commenced the construction of a house on one of the lots owned by them, pursuant to a building permit obtained from the city, and this residence had been partially com-

pleted at the time of the filing of the condemnation suit. The Venables filed their answer to the petition for condemnation, together with a cross-claim and counter-claim naming as defendants the City of Creve Coeur, the members of the council and certain other individuals.

It was alleged in this cross-complaint and counter-claim that these defendants:

> refused to issue to defendants and their contractor a plumbing permit to which they were entitled under the ordinances of the City of Creve Coeur and applicable regulations of the Metropolitan Sewer District; "hastily chose a site for alleged park condemnation purposes" and "disregarded the unsuitable topog-



> raphy, location and cost of the area sought to be condemned * * *;
>
> "initiated no effort to include the site sought to be condemned for park purposes" within a co-operative program with municipalities located in St. Louis County;
>
> acquiesced on the basis of passion, bias and prejudice in a scheme, device and artifice of a Citizens-Committee whose operation concerned the solicitation and payment of donations to acquire the real estate owned by and surrounding the defendants in order to eliminate occupancy by said defendants;
> Enacted "a condemnation ordinance solely for the purpose * * * of denying to them (the Venables) the exercise of their constitutional rights of residence in the City of Creve Coeur" * * *.

After charging the overt acts summarized above the counter-claim and cross-claim further alleged that the defendants were being deprived of their constitutional rights

and the equal protection of the laws and privileges and immunities of citizens of the United States and the State of Missouri.

The city moved to dismiss the cross-claim and counter-claim on the ground that the allegations simply raised a question of the motive of the legislative body of the City of Creve Coeur in passing the ordinance, and that the trial court had no jurisdiction to inquire into legislative motives where a proper legislative purpose had been established.

In discussing this contention the St. Louis Court of Appeals said at page 406:

"The cases examined by us clearly hold that once

R. 273

> it is established that the use for which private property is appropriated is public, the judicial authority of the court is exhausted. This means that the courts have no authority to pass upon the motives of a legislative body in enacting a statute or an ordinance and are powerless to consider the question of what reasons actuated the legislative body in the passing of the statute or the ordinance, as the case may be."

In reversing the action of the trial court in assuming jurisdiction, and in making its writ of prohibition permanent the court of appeals concluded at page 410:

> "We are aware of the seriousness of the charges contained in the counter-claim and cross-claim filed by the Venables and because of the gravity of the allegations we have conducted an exhaustive research to determine if an exception to the rule, as announced in the *City of Kirkwood* case, was authorized. We found no authority authorizing an exception, and none has been cited to us by respondent. The motive which

actuates and induces the legislative body to enact legislation is wholly the responsibility of that body and courts have no jurisdiction to intervene in that area. *City of Kirkwood* v. *Venable, supra.* "The ordinance passed by the City of Creve Coeur condemns the property for use as a public park and playground. If the land is to be used for this purpose, there is no doubt about it being taken for a public use. However, nothing we have said in this opinion will prevent the Venables from showing as a defense to the condemnation action that the property condemned will not be used as a public park and playground."

With these authorities ranged squarely against it there



would be ample reason to close the door on Progress's attempt to inquire into the motives of the members of the Park Board in filing this suit as contrasted to their purpose. If this were done Progress would have no legal right to complain—it would have received the same treatment as any other defendant in a condemnation suit owning property sought for public purposes. Progress is entitled to no more than equal consideration.

Progress, however, takes the position that nothwithstanding the admitted need for more parks and the suitability of its land for this purpose, nevertheless the filing of this suit represents "purposeful discrimination" against it. It recites the series of events that took place in Deerfield following the release of the news that some of its homes would be sold to Negroes, and says that the *only* reasonable interpretation that can be placed on this evidence is that a conspiracy existed to deprive it of its right to do business in Deerfield.

In making this charge Progress has involved an entire community and the present condemnation suit has been turned to a troublesome problem in race relations. This phase of the case received some comment by Chief Judge Hastings speaking for the court in the appeal taken by Progress in its conspiracy action filed in the United States District Court. (*Progress Development Corporation* v. *Mitchell*, 7th Cir. 1961, 286 Fed. Rep. (2d) 222.) Chief Judge Hastings said at page 234:

> "Since all parties have attempted to inject a racial issue into these proceedings, it seems appropriate to comment on the real issue involved in this litigation.
>
> R. 275
>
> The plaintiffs are two corporations organized for profit utilizing only private capital in their operations. No federal agency and no federal funds are involved. For reasons best known to themselves plaintiffs have widely advertised and proclaimed a sales policy based upon a controlled occupancy plan with a quota system they have deemed best suited for the social progress of Deerfield. Some of the citizens of the Village of Deerfield have openly voiced their objections to such a plan and in doing so have exercised their constitutional right of freedom of expression and peaceable assembly. Other citizens of that community have exercised a similar right to express an opposite viewpoint. Plaintiffs have alleged that the conduct of the former group, acting in concert with lawfully constituted Village officials, amounts to an unlawful conspiracy designed to cause such officials to subvert their lawful powers of condemnation and enforcement of local building ordinances to the end that plaintiffs are deprived of their lawful right to engage in business and make a profit. This case is that and nothing more.

> In this case no individual claims to have been denied a personal right. No one claims he has been denied the right to purchase a home. No one claims he has been denied the right to vote, to go to school, to live in a certain place, to eat in a public place, to seek transportation without interference or to work or worship as he chooses. We are concerned with the corporate right to engage in business and make a profit."

The only remaining issue is whether Progress has shown by clear and convincing evidence the existence of a conspiracy to prevent it from doing business in which the participants are guilty of "purposeful discrimination"

R. 276

against it. All the evidence produced by Progress which bears in any way upon this issue has already been summarized in chronological sequence and need not be repeated here.

When this evidence is analyzed it reveals nothing more than that a large number of Deerfield citizens were opposed to the type of integrated subdivision proposed by Progress. The poll taken by the Residents Association clearly revealed this attitude, and at least one member of the Park Board (Keller) openly expressed his opposition to the project.

The evidence also shows that it was during the heat of this controversy that the Park Board submitted to the voters of the Park District the question whether they wished to approve a $550,000 bond issue to provide funds for six (6) new park sites, including Floral Park and Pear Tree.

At this referendum 2635 voters expressed a willingness

to spend this sum for parks. 1207 voters voted against the bond issue. No one can accurately pin point the motives that may have prompted the voters in this referendum. The field of human motivation is one in which psychiatrists and sociologists cannot find agreement. There were undoubtedly some voters who favored parks, and who had no objection to the Progress development; there were undoubtedly other voters who favored parks and did object to the Progress development. It is apparently Progress' contention that there were many voters who were opposed to its development who voted for the referendum for this reason alone. The observation made by Mr. Justice Stone in the *Soon Hing* case *supra*, is equally applicable here:



"The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile."

Stripped to its essentials, the contention of Progress is that the residents of Deerfield had no legal right to make a choice between the use of Progress' land for park purposes for the benefit of the general public of Deerfield in preference to its use by the defendant for a private residential development. The Supreme Court of Illinois in its prior opinion in this case (*Deerfield Park Dist. v. Development Corp.*, 22 Ill. (2d) 132), has already found this contention to be without any legal merit. At page 140 of this opinion Mr. Justice Solfisburg says:

> "If parks are needed in Deerfield, and if the land so selected for them is appropriate for that purpose, the power of eminent domain cannot be made to depend upon the peculiar social, racial, religious or political

predilections of either the condemning authority or the affected property owner. Progress is entitled to the same opportunity to hold land and operate a business as anyone else. They, like all others, hold their land subject to the lawful exercise of the power of eminent domain."

Some persons may criticize the judgment of the Park Board in holding its referendum at the height of this controversy. The timing of this referendum represented a political decision on the part of the Park Board, subject to review by the voters of the district along with the other acts of the Park Commissioners.

The Park Board had no legal obligation to explain its motives in submitting this referendum to the voters and in



the filing of this condemnation. However, the Park Board offered evidence at the hearing in this case showing that it had already considered both Floral Park and Pear Tree as possible park sites prior to this controversy. The evidence is also undisputed that two earlier referenda had been defeated. If speculation and conjecture are to be indulged in as to the motives of the members of the Park Board one reasonable explanation is that the Park Board considered this controversy as an opportunity to secure this desirable land for needed park purposes on the basis that if action were delayed at this time this land would have been lost for future park development.

The members of the Park Board each testified that—

"I am a commissioner of the Village of Deerfield Park District, and as such commissioner I receive no salary, expense account or cash. I am a commissioner because I believe in the progress of any well organized com-

munity, and the park-school program would benefit the entire village particularly the taxpayers so I serve as a civic duty. My sole and only motive and purpose in voting for the passage of the referendum resolution of December 7, 1959, was to acquire needed park lots for all of Deerfield. I did not have any purpose or motive whatsoever to interfere in any way with the plans of the Progress Development Corporation."

James Mitchell, the president of the Park Board testified—

"I think the Park Board members are not opposed to integration. Through the years on the question of integration the Park Board has been cast in a light that I don't think if particularly enjoyed. I am not

R. 279

opposed to integration. No one asked me that question and I absolutely am not opposed to integration."

The only case cited by Progress on the issue of "purposeful discrimination" is *Snowden* v. *Hughes*, 321 U. S. 1, 64 S. Ct. 397. In this same case the court said:

"But a discriminatory purpose is not presumed, *Tarrance* v. *State of Florida*, 188 U. S. 519, 520, 23 S. Ct. 402, 403, 47 L. Ed. 572; there must be a showing of 'clear and intentional discrimination', *Gundling* v. *City of Chicago*, 177 U. S. 183, 186, 20 S. Ct. 633, 635, 44 L. Ed. 725; see *Ah Sin* v. *Whitman*, 198 U. S. 500, 507, 508, 25 S. Ct. 756, 758, 759, 49 L. Ed. 1142; *Bailey* v. *State of Alabama*, 219 U. S. 219, 231, 31 S. Ct. 145, 147, 55 L. Ed. 191."

If any presumption is to be indulged in the members of the Park Board are entitled to the presumption that public officials are presumed in the performance of their official duties to act honestly and with proper motives.

This rule is well stated in *Tribune Co.* v. *Thompson*, 342 Ill. 503, where a charge of conspiracy was made against certain public officials. The court there said at page 529:

> "There is no direct evidence in this case to prove the conspiracy, and while conspiracy may be proved by undirect or circumstantial evidence such evidence must be clear and convincing, and if the facts and circumstances relied upon are as consistent with innocence as with guilt it is the duty of the court to find that the conspiracy has not been proved. * * * The rule is well established that public officials in the performance of official acts are presumed to act in good faith and



> with honest motives. *Hallett* v. *City of Elgin*, 254 Ill. 343; *Wolbach* v. *Rubens*, 307 id. 186; *People* v. *Chicago, Burlington and Quincy R. R. Co.*, 314 id. 445; 22 Corpus Juris, 135."

Unless suspicion and conjecture are to be substituted for evidence there is no proof in this record of any express or implied agreement on the part of the members of the Park Board with any other persons to institute this condemnation for the sole purpose of forcing Progress out of business.

A reasonable interpretation of the evidence relating to Mitchell and Walchli (the only members of the Park Board who are even charged with any specific misconduct) is that these commissioners were anxious to obtain more land for parks, and were willing to enlist the aid of the members of the Citizens Committee and the Residents Association in securing support for the referendum.

The acquisition by the Park Board of additional land for public use by the citizens of Deerfield was a lawful

purpose. The means adopted to accomplish this object—the referendum and the condemnation—were lawful means. A common undertaking to accomplish a lawful object in a lawful manner is not a conspiracy irrespective of the motives of those engaged therein. (*Boasberg* v. *Walker*, 111 Minn. 445, 127 N. W. 467.)

The United States District Court (*Progress Development Corporation* v. *Mitchell*, 182 F. Supp. 681) and the Circuit Court of Appeals (*Progress Development Corporation* v. *Mitchell*, 286 F. (2d) 222), cosidered this same evidence and found it insufficient to sustain Progress' charges of

R. 281

conspiracy. In the District Court Judge Perry said at page 700:

> "The plaintiffs were given wide latitude in the production of all proofs possible. All sources of possible conspiracy were minutely examined into by plaintiff's counsel. No conspiracy, or any semblance of conspiracy by the Park Board Commissioners was proved. * * *"

Chief Judge Hastings in the Circuit Court of Appeals said at page 299 in affirming the order of the District Court in denying a preliminary injunction to Progress:

> "We have carefully studied the entire voluminous record of the evidence adduced at the lengthy hearings and conclude that on the basis of the testimony and documents before it, the court was fully justified in denying temporary equitable relief under both Counts I and II. The trial court's findings are not only supported by substantial evidence, but our examination of the record fails to reveal to us any evidence of conspiracy. Many statements by individual defendants, which were characterized as extreme

and provocative, appear to have been made in the context of public discussion and in the exercise of an individual's constitutional rights of free speech and peaceable assembly. We do not pass judgment on the propriety and wisdom of such statements relating to the cause and effect of integrated housing."

Progress has already agreed to accept the sum of $166,199.91 as fair compensation for its two properties. It has had its full hearing upon the issues raised by its motion to dismiss. The evidence establishes without question that the taking of this property is necessary and for a public



purpose. The evidence wholly fails to establish the charge of conspiracy against the members of the Park Board. In this situation Progress, as any other citizen, must yield to the paramount right of the Park District to take private land for public use.

Nothing in this decision will affect or impair in any way the admitted right of Progress to carry on its business at any other location where it may be authorized to build homes and at its election to sell a selected number of these homes to members of the Negro race.

Because Progress has failed to establish any defense to this suit its motion to dismiss must be denied.

Petitioner may prepare and, after notice to Progress, present a final order of condemnation. In such order the following findings will be made:

1. That on the date of the filing of this condemnation there was a *bona fide* need for additional land for park purposes in the Deerfield Park District, and such need still exists.

2. That the two properties owned by Progress and sought by petitioner for park purposes, and known as Floral Park and Pear Tree, are needed for park sites, are suitably located and will be used for park purposes.

3. There is no evidence that any member of the Park Board formed or engaged in any conspiracy to deprive Progress of any of its legal rights.

4. The condemnation of Progress' properties is necessary and for a public purpose.

BERNARD M. DECKER,
*Judge.*

LIBRARY
SUPREME COURT, U. S.

No. 871

Office-Supreme Court, U.S.
FILED
APR 3 1963
JOHN F. DAVIS, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1962**

---

PROGRESS DEVELOPMENT CORPORATION,
*Petitioner,*

*v.*

DEERFIELD PARK DISTRICT, *Respondent.*

---

## REPLY MEMORANDUM FOR PETITIONER

---

JOSEPH L. RAUH, JR.,
EUGENE GRESSMAN,
JOHN SILARD,
*1625 K Street, N.W.,*
*Washington 6, D.C.*

JOHN W. HUNT,
RICHARD G. KAHN,
HOWARD HOOSIN,
JOHN P. MORRIS,
*135 South LaSalle Street,*
*Chicago 3, Illinois,*
*Attorneys for Petitioner.*

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1962**

---

**No. 871**

---

PROGRESS DEVELOPMENT CORPORATION,
*Petitioner,*

*v.*

DEERFIELD PARK DISTRICT, *Respondent.*

---

## REPLY MEMORANDUM FOR PETITIONER

---

The two really striking features of respondent's Opposition are the failure to challenge either the facts set forth in the Petition for Certiorari or the importance of the constitutional question decided by the Supreme Court of Illinois: Respondent's tangential attack on the Petition (in essence a confession and avoidance) eloquently bespeaks the compelling strength of petitioner's case for certiorari.

Significantly, what respondent calls petitioner's "highly biased presentation" of facts (p. 4) is nowhere rebutted in the Opposition. Petitioner's documented presentation of the sequence of events in Deerfield which shows the hand-in-glove participation of public authorities and private

citizenry to replace housing integration with public parks, stands undisputed before this Court.*

Equally significant, the Opposition reinforces the importance of the question decided by the Supreme Court of Illinois—for it reiterates the position, adopted below, that once it is conceded that land is needed for parks and will be used for parks, "Once this step has been reached, the authority of the judiciary to proceed with the case ceases" (Opp., p. 18). Yet this exalting of eminent domain powers as beyond the reach of the Fourteenth Amendment flies in the face of the rulings of this Court (Petition, pp. 17 to 22), which attach constitutional safeguards to the exercise of otherwise legitimate public powers, including the power of eminent domain. Indeed this Court has but recently underlined the fact that constitutional rights do not bow before claims of state convenience or necessity, whatever stature those claims may have in the absence of a constitutional

---

* The Opposition, while conceding by its silence the sequence of events from November 11, 1959, when the "Negro news" broke in Deerfield, until December 24, 1959, when this condemnation action began, seeks to leave this Court with the false impression that the sites in question had somehow been selected by the Park Board in May, 1959 (Opp., pp. 3, 5-6). But the material presented in the Opposition demonstrates *precisely the contrary;* the so-called recommendations of the consulting park planner to the Park Board in May of 1959, including the map set forth in the Opposition, was *rejected* by the Park Board (See Petition, p. 5, n. 1). Actually on the overall map of prospective park acquisition which was published in April, 1959 by the Park Board itself, neither Pear Tree nor Floral Park was designated (R. 231). The consulting park planner's map of May, 1959 designated the Floral Park site but *not* the Pear Tree site. *And in the Park Board referendum conducted in August, 1959, neither Floral Park nor Pear Tree was proposed for acquisition* (R. 81). What consideration the Park Board itself had given to the acquisition of these two sites was thus entirely negative until November 11, 1959, when it became known that Negro residents would live at these sites. No one has ever suggested any intervening event other than the integration news which rendered the park sites rejected by the Park Board in August more desirable in December. Nor has anyone ever denied, and the Opposition by its silence concedes, that if petitioner had been building houses for whites only, Floral Park and Pear Tree would long since have been fully-occupied residential developments and the issue of parks thereon would never have arisen.

violation. See *NAACP* v. *Button*, 371 U.S. 415; *Fay* v. *Noia*, 31 Law Week 4255, 4264 (March 18, 1963).

Perhaps petitioner need not have troubled this Court with a Reply, in view of the Opposition's failure to answer either the undisputed facts (Petition, pp. 2 to 14) or the authorities of this Court demonstrating that the Supreme Court of Illinois has employed a dangerously erroneous constitutional standard. But it may not be out of order to correct certain factual errors in the Opposition's tangential attack on two grounds—the suggestion that no constitutional issue arises because no "conspiracy" was found by the Illinois courts (Opp., pp. 14-17) and the claim that petitioner indulges in a racially discriminatory quota system (Opp., pp. 25-31).* Neither point can withstand analysis:

1. The Opposition seeks to shift attention from the erroneous constitutional standard announced and applied by the Supreme Court of Illinois by emphasizing that the Illinois courts had found that there was no "conspiracy" among Park Board members to deny equal protection to petitioner. But the constitutional question does not depend on, nor has petitioner ever restricted its case to, the showing of a technical "conspiracy." Thus in making its defense to the condemnation action in the lower court, petitioner included in its defensive pleading its prior complaint in the federal court; that document repeatedly asserts the denial of equal protection and petitioner's constitutional rights by the condemnation action, apart from and beyond any "conspiracy" by Park Board members. See, e.g., R. 4, 9, 18, 31, 32, 37-38.

* One additional error in the Opposition warrants answer. The Opposition (p. 1) suggests that petitioner failed to comply with the rules of this Court in not printing the trial judge's opinion. But Rule 23(1)(i) expressly states that "where the petitioner has filed with his petition nine copies of the record as printed for the use of the court below . . . then only the pertinent opinions not contained therein need be appended to the petition." Nine copies of the record, which included the trial judge's opinion (R. 246-282), were filed in this case.

Nor did the Supreme Court of Illinois attach any significance to the existence or absence of "conspiracy." In answer to petitioner's argument below—identical to its argument here—the court below simply ruled that all constitutional questions were foreclosed by the showing that petitioner's properties were suitable for and would be used for public parks. Under these circumstances the significant point remains that the narrow constitutional view taken by the Supreme Court of Illinois foreclosed judicial consideration of petitioner's unrebutted showing that the taking of its properties was occasioned by, built upon, achieved through, and resulted in racial segregation in Deerfield, Illinois.

2. In a transparent effort to discredit petitioner's position before this Court that discrimination in housing cannot be achieved through state action, respondent has charged that petitioner itself engaged in racial discrimination in its sales of homes. Such an assertion, unsupported by any evidence at the trial, is completely irrelevant and erroneous. The eminent domain action sprang solely from the news that Negroes would be eligible to buy homes from petitioner; any contention that a so-called quota system of sales is invalid is a pure afterthought having no bearing on the sequence of events in Deerfield.

It is ironic indeed to find an all-white community which has resisted the incursion of *any* Negro resident, pleading before this Court that *not enough* Negroes would be living at petitioner's properties in Deerfield. In any event, there is no showing whatever that petitioner has ever denied or would ever deny housing to an applicant because of his race.* Petitioner does not desire to build new Negro

* As Morris Milgram, President of petitioner's parent organization, testified at the federal trial, "our concern is to prevent uni-racial neighborhoods. It is not our concern to prevent individual whites or individual Negroes from buying houses. But by guiding our advertising to channels that will reach the entire community, to have a community that is representative of all the people."

ghettos, but to demonstrate the viability of integrated suburban developments. To this ends petitioner does everything possible to encourage not merely Negro purchases of its properties, but also a significant ratio of white occupancy. But this encouragement of integration has never involved a discriminatory denial of housing to a Negro applicant, for petitioner abhors the racial discrimination of which it is presently the victim in Deerfield, Illinois. Respondent's hypocrisy is hardly an answer to petitioner's good faith efforts at integration.

* * * * *

By abuse of the power of eminent domain, Deerfield has thus far successfully postponed housing integration for four years. But the constitutional violation which Mrs. Roosevelt so aptly denominated "the Little Rock of housing", can hardly survive the sensitive scrutiny of our highest constitutional tribunal. We urge that the writ be granted.

Respectfully submitted,

JOSEPH L. RAUH, JR.,
EUGENE GRESSMAN,
JOHN SILARD,
*1625 K Street, N.W.,*
*Washington 6, D.C.*

JOHN W. HUNT,
RICHARD G. KAHN,
HOWARD HOOSIN,
JOHN P. MORRIS,
*135 South LaSalle Street,*
*Chicago 3, Illinois,*
*Attorneys for Petitioner.*

(6546-6)